In the Supreme Court of the United States.

OCTOBER TERM, 1904.

WILLIAM K. VANDERBILT ET AL., AS EXECUTORS, etc., plaintiffs in error,
v.
FERDINAND EIDMAN, AS UNITED STATES COLLECTOR of internal revenue, defendant in error.

No. 206.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF FACTS.

In accordance with the provisions of section 6, chapter 517, of the act of March 3, 1891, entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," this case is certified to the Supreme Court of the United States by the United States circuit court of appeals for the second circuit, upon the following statement of facts:

The above-entitled action was commenced in the United States circuit court for the southern

district of New York, by the above-named William K. Vanderbilt et al., as executors, etc., to recover of the above-named Ferdinand Eidman, United States collector of internal revenue, etc., the sum of $311,681.36, which sum was assessed June 26, 1901, and collected September 3, 1901, by the said collector from the said William K. Vanderbilt et al., as executors, etc., under protest, as a tax on a legacy, arising from personal property, pursuant to sections 29 and 30 of the act of June 13, 1898 (30 Stats. at Large, 464), entitled "An act to provide ways and means to meet war expenditures, and for other purposes," and of said act as amended by the act of March 2, 1901, entitled "An act to amend an act entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' approved June thirteenth, eighteen hundred and ninety-eight, and to reduce taxation thereunder." (31 Stat., 946.)

The above-named defendants in said action in the circuit court demurred to the complaint of the above-named plaintiffs in said action, on the general ground that the complaint did not state facts sufficient to constitute a cause of action. The United States circuit court sustained said demurrer, and directed judgment to be entered in favor of the defendant dismissing said complaint, and for costs and disbursements of the action, which judgment was entered. (121 Fed., 590.)

The said judgment was brought into this court for review by a writ of error duly sued out by the plaintiffs in said action, and the cause

having come on for hearing and argument in this court, certain questions of law arose, concerning which this court desires the instructions of the United States Supreme Court for its proper decision, and which questions arose from the following facts:

Cornelius Vanderbilt died in the city of New York on September 12, 1899, leaving a will which was thereafter duly admitted to probate, the seventeenth clause of which will provided as follows:

"Seventeenth. All the rest, residue, and remainder of all the property and estate, real, personal, and mixed, of every description, and wheresoever situated, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, including all lapsed legacies and the principal of any annuities which may terminate and any part of my estate which may not have been effectually devised or bequeathed or from any other source, I give, devise, and bequeath to my executors, hereinafter named, and the survivors and survivor of them, *in trust*, to hold said estate and invest and reinvest the same and to collect the rents, issues, income, and profits therefrom for the use of my son, Alfred G., and to apply so much of said net income as may be in their judgment advisable, to his support, maintenance, and education, and for the care and maintenance of his property during his minority, and to accumulate any surplus income, such accumulations to be paid to him when he arrives at the age of twenty-one years and thereafter to pay

the net income of said estate to him as received until he arrives at the age of thirty years, when he shall be put in full possession of one-half of the portion of said estate to be set apart for that purpose by my executors and the survivors of them. And upon further trust thereafter to pay to my said son, Alfred G., the income from the balance remaining of said estate until he shall arrive at the age of thirty-five years, when he shall be put in possession of the balance of said trust estate, and the said trustees shall be discharged from any and all liability and responsibility in respect thereof. If my son Alfred G. should die before attaining the age of thirty-five years, leaving issue, such portion of the estate as shall not then have come into his possession shall be divided by my executors into as many equal shares as he may leave children him surviving, and one share shall be held by my executors to the use of each such child or children until he or she shall attain the age of twenty-one years, when it shall be paid to such child; but if he shall die without child or children, or if none of his children shall attain majority, then it is my will that my son Reginald C. shall in all respects, as to said residuary estate, stand in the place and stead of his brother Alfred G., and that if Alfred G. shall die without issue before he attains the age of thirty years, then Reginald C. shall receive the income from said estate until he attains the age of thirty years, when he shall be put in possession of one-half of the residuary estate, and thereafter Reginald C. shall receive the net income of

the remaining one-half of my estate, and on arriving at the age of thirty-five years he shall be put in possession of the whole of said estate, and my executors shall hold said estate upon such trust, and I give and devise the same accordingly. If Alfred G. and Reginald C. shall both die before being put into possession of said estate, and without issue, I give whatever then remains of my residuary estate to my daughters Gertrude and Gladys Moore, share and share alike; and if either of my said daughters be then dead leaving issue, her issue to take his or her mother's share, *per stirpes* and not *per capita;* and in default of issue, the survivor shall take the principal."

This clause contains the only provisions in the will relating to or in any manner affecting the disposition of the residuary estate of the testator and determining the extent and character of the interests therein.

All of the children of said Cornelius Vanderbilt named in the seventeenth clause of his will survived him and were living at the time this suit was brought. At the time of the death of the said Cornelius Vanderbilt his son Alfred G. Vanderbilt was between 22 and 23 years of age, and his son Reginald C. Vanderbilt was between 19 and 20 years of age, and both were unmarried.

The appraised value of the residuary personal estate at the time of the testator's death was $18,972,117.46.

The appraised value of Alfred G. Vanderbilt's interest in the income of the residue until he

becomes 30 years of age was $5,119,612.43. With respect to this interest the executors of Cornelius Vanderbilt paid an internal-revenue tax under sections 29 and 30 of the "war-revenue act" of June 13, 1898, at the rate of 2¼ per cent thereon, amounting to $115,191.28.

The Commissioner of Internal Revenue thereafter, under the alleged authority of sections 29 and 30 of said "war-revenue act," assessed with respect to Alfred G. Vanderbilt's interest in the residue an internal-revenue tax at the rate of 2¼ per cent on the full appraised value of the residue, amounting, as aforesaid, to $18,972,117.46.

Which tax amounted to	$426,872.64
Against this was credited the tax already paid on the interest above referred to, such interest being included in the entire value of the residue, which tax amounted to	115,191.28
Leaving an unpaid balance of the tax assessed as aforesaid amounting to	311,681.36

In making this assessment the Commissioner of Internal Revenue claimed and assumed that, because according to the average of chances shown by the mortality tables at the time of the death of Cornelius Vanderbilt, Alfred G. Vanderbilt had an expectancy of life beyond the period when, if he lives so long, he will become absolutely entitled to the entire principal of the residuary estate, he was to be considered for the purposes of assessing the taxes imposed by sections 29 and 30 of the said act of Congress of June 13, 1898, as then having a present

vested interest in the entire principal of the residue.

The unpaid balance of this assessment was paid by the executors under protest and upon compulsion of the collector's threat of distraint and sale on the 3d day of September, 1901. The executors thereupon made the statutory application to the Commissioner of Internal Revenue for its refund, which was refused, and this action for the recovery of said amount so paid was thereupon commenced in the circuit court for the southern district of New York, as above set forth.

The questions upon which the circuit court of appeals asks instructions are—

I. Is the tax imposed by sections 29 and 30 of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," with respect to Alfred G. Vanderbilt's interest under the seventeenth clause of the will of Cornelius Vanderbilt, a tax upon the transmission to and receipt by the trustees of the property passing to them as trustees under the legacy out of which such interest arises?

II. If the preceding question is answered in the negative, is the tax imposed under said act with respect to Alfred G. Vanderbilt's interest under said seventeenth clause a tax upon the transmission to and receipt by said Alfred G. Vanderbilt of his beneficial interest in the property passing under such legacy?

III. Did sections 29 and 30 of said act authorize the assessment and collection of a tax with

respect to any of the rights or interests of Alfred G. Vanderbilt as a residuary legatee of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the will, with the exception of his present right to receive the income of such estate until he attains the age of 30 years, prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?

IV. If the tax under sections 29 and 30 of said act was presently assessible and collectible upon all the interests of Alfred G. Vanderbilt in said legacy, was the clear value of all such interests, for the purposes of computing the tax, equal to the full value of the property comprised in the legacy out of which such interests arose?

The material parts of the act of June 13, 1898, above referred to, read as follows:

SEC. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, * * * to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is

to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who dies possessed of such property as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

* * * * *

* * * where the amount of value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement in duplicate of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his

oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereupon paid to such collector; * * *

ARGUMENT.

The right of the United States to assess and collect the inheritance tax upon the estate of Cornelius Vanderbilt, as above set forth, rests upon the following propositions: First, vested remainders are taxed by the law of June 13, 1898, the tax attaching at the time of vesting; second, the tax is to be assessed and collected at the time of vesting; third, the interest of Alfred G. Vanderbilt in the principal of the residue which the will provides he shall be put in full possession of, one-half at the age of 30, and the other half at the age of 35, is a vested remainder; fourth, the clear value of the interests of Alfred G. Vanderbilt was correctly ascertained by the Commissioner of Internal Revenue, and the tax thereon properly levied.

I. VESTED REMAINDERS ARE TAXED BY THE LAW OF JUNE 13, 1898.

A. AS SHOWN BY HISTORY OF LEGACY TAX LEGISLATION OF CONGRESS.

In ascertaining whether or not Congress intended by the act of June 13, 1898, that vested remainders should be taxed, a short review of prior legislation of Congress relative to inheritance taxes is useful. The first legacy tax imposed by Congress was passed in 1797, and took the form of an ad valorem stamp tax upon "any receipt or other discharge for or on account of any legacy, left in any will or other testamentary instrument, or for any share or part of a personal estate divided by force of any statute of distributions." This was repealed in 1802. In 1862 Congress again provided a legacy tax, which was in effect reenacted in 1864 with the addition of a duty on real estate passing upon the death of the owner thereof. The act of 1864, as regards personal property, is in effect the same as the act of 1898. This is fully set forth on pages 70 and 71 of the opinion of Mr. Justice White, in the case of *Knowlton* v. *Moore* (178 U. S., 41), where it is said:

> Observing closely the text, it is apparent that the clause therein which points out what is to be taxed is an exact copy of the act of 1864, except the substitution of the "ten" for the word "one." The subject taxed, therefore, under the present act (act of 1898) is the same which was taxed under the act of 1864. This is the equivalent of a mathematical certainty. (p. 71.)

Previous to that, on page 69 the court had said:

> That the provisions of the act of 1864 were in mind when the present act was drafted is apparent, since it is not disputed that the act under review, so far as the tax on legacies and distributive shares is concerned, is an exact reproduction of the original act of 1864, except to the extent that the present act contains provisions relating to a progressive increase of rates. We say of the original act, because the present act does not contain in it the amendments to which we have referred, made in 1866; the fair inference being that the writer of the present act had before him the original text of the act of 1864, and not that text as amended by the act of 1866.

The amendment of 1866 referred to, provides:

> * * * That the tax or duty aforesaid shall be due and payable whenever the party interested in such legacy, or distributive share, or property or interest aforesaid, shall become entitled to the possession or enjoyment thereof, or to the beneficial interest in the profits accruing therefrom.

The custom of the Internal Revenue Bureau in collecting taxes under the law of 1864 is of the greatest importance. It is ascertained that in construing that law, taxes were levied and collected upon future interests in personalty at the time of vesting, regardless of the time the legatee or distributee should come into possession or enjoyment of the same.

The purpose of the amendment of 1866 was to prevent the collection of taxes upon vested remainders

until they should take effect in possession or enjoyment. Obviously vested remainders were taxed by the law of 1864, intended and considered by Congress to be so taxed, for otherwise the amendment postponing the time of payment would have been unnecessary.

While it is true, as stated by Mr. Justice White in a quotation set forth above, that the writer of the present act had before him the original text of the act of 1864, and not that text as amended by the act of 1866, it is also true that the legislators must have considered the custom of the Internal Revenue Bureau in enforcing the former law and also considered the amendment of 1866, and apparently arrived at the conclusion that under the present law vested remainders should be taxed, and the tax should be due and payable when the remainders vested, not postponed until they should take effect in possession or enjoyment; for the amendment is neither in form nor substance incorporated into the act of 1898. This is the only reasonable interpretation which can be given to such action. The omission of Congress to reenact in the present law the amendment of 1866 has great significance in determining its intention relative to taxation of vested remainders.

The force and effect of the amendment of 1866 is set forth in the case of *Mason* v. *Sargent* (104 U. S., 689). William P. Mason died December 4, 1867, bequeathing personal property to trustees, his widow to have a beneficial interest therein during her life, his children to take the beneficial interest upon her death. The widow died in 1872, subsequent to the repeal of

the inheritance-tax law. The court held that a legacy tax upon the interest of the children of the testator was without authority of law, assessed in April, 1873, as no right to the payment thereof had accrued prior to the repealing act. Among other things the court said:

> The property or fund which is the subject of the legacy was expressly exempt from tax or duty, in the hands of the trustee, during the life of the testator's widow.
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> by the express terms of the section, as amended by the act of 1866, the tax or duty becomes due and payable only when "the party interested in such legacy, etc., shall become entitled to the possession or enjoyment thereof," etc.
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> The subject of the tax is the interest of the legatees in the remainder; but it is not taxable as a remainder, for by the terms of the law it does not become a subject of taxation until the right accrues to reduce it to possession. Until then it is expressly exempt from taxation.
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> In the present case it is clear beyond dispute that during the life estate of the widow there was no lien upon the fund, because during that period it was expressly exempt from the tax. (Pp. 692, 693.)

The view here taken of the intention of Congress in omitting the reenactment of the amendment of 1866 is further fortified when we turn to the tax imposed upon

succession to real estate by the act of 1864, which provides *inter alia:*

> *Be it further enacted*, That the duty imposed by this act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to the succession, or to the receipts or income of the profits thereof.

Here again we find Congress expressly postponing the time for imposition of the death duty until the party shall "become entitled in possession." Had Congress not intended by the act of 1898 to tax vested remainders and have the tax collected at the time of vesting, even though the possession or enjoyment thereof might be postponed to a future day, it would have followed precedents established by itself in the act placing a tax upon the succession to real estate and the amendment of 1866, and would have expressly legislated to that effect.

B. ANALYSIS OF THE STATUTE.

An analysis of the language of the act lends cogency to the conclusion that vested remainders are taxed. The words "legacy" and "distributive share" are comprehensive enough to include vested remainders. The words "passing * * * from any person possessed * * * to any person * * * in trust or otherwise," are themselves determinative in this question. They have already been interpreted by the circuit court for the eastern district of Pennsylvania and the circuit court of appeals, third circuit. In the case of

Pennsylvania Company for Insurance on Lives and Granting Annuities v. *McClain* (105 Fed., 367), the facts were thus stated:

> This is an action to recover back a sum of money collected from the plaintiff under the following circumstances: The residuary clause of the will of Isaiah V. Williamson, who died in 1889 in the city of Philadelphia, directed his executors to transfer to the plaintiff the residue of the estate, to be held for accumulation during ten years after his death, and at the end of that period to be divided among such of his grand-nephews and grandnieces as might then be living.

The court held that the interests of the grand-nephews and grandnieces were not taxable under the law of 1898.

Upon appeal of this case to the circuit court of appeals, the judgment of the court below was affirmed. (108 Federal, 618.) The court here said:

> * * * It is the passing, not the vesting, of the legacies which the act makes material, and that the passing from Williamson occurred at the time of his death is, of course, indubitable. But it is contended that the phrase "passing * * * from any person possessed of such property" should not, in this instance, be related to the testator, but to his testamentary trustee; that not Williamson, who died possessed, but the Pennsylvania Company, who took the legacies "in charge or trust," should be regarded as the "person possessed," from whom the passing was to take place. We can not sustain this conten-

tion. It puts a construction upon the statute which is certainly too questionable to be accepted as creative of a tax, and which, we think, the context shows to be a wholly inadmissible one. The passing, says the act, is to be "either by will or by the intestate laws," and surely the correct, as well as the common, understanding is that property passing either by will or by intestacy passes from and by virtue of the will or intestacy of the person who dies possessed, and not from or by the will or intestacy of any fiduciary who for a time may have it in charge. Personal estate "passing * * * by the intestate laws" always, of course, passes from the intestate himself, and never from the administrator, no matter how long the settlement of the estate may be postponed; and therefore, inasmuch as the manifest purpose of Congress was to deal with testacy and intestacy alike, it can not be supposed that the intended "passing * * * by will" could be a passing from "executors or trustees." Moreover, the passing was defined as being not only from the person possessed, but also as being "to any person or persons, or any body or bodies politic or corporate, in trust or otherwise." Therefore, when there was here a passing to the trustee, the defined event occurred. There was then a passing to a body corporate "in trust," and, as it is evident that but a single occasion of passing was contemplated, any subsequent passing "otherwise" than in trust must necessarily be inconsequent.

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These clauses can not be read without perceiving that by the person described in each of them as "the person who died possessed as aforesaid" there was meant the same person as, in the immediately preceding paragraph of the same section, was referred to as "any person possessed of such property." Consequently, we have the person from whom the passing was to proceed plainly identified as the person dying possessed, and it is inconceivable that an administrator, executor, or trustee would have been so designated. Furthermore, section 30 provides "that the tax or duty aforesaid shall be a lien or charge upon the property of every person who may die as aforesaid," and surely the purpose was to impress the lien upon the property taxed, and not upon that of any fiduciary who, having it in charge, might happen to die during the continuance of the trust. If we were not fully convinced of the correctness of the views we have expressed, all doubt upon the subject would be removed by consideration of the fact that the war-revenue act of 1864, the tax-imposing language of which was, so far as material, precisely the same as that of the present act, had been officially administered in accordance with our understanding of the effect of that language, and this established construction of it must be presumed to have been known to Congress when it again used the same language in the act of 1898. The judgment of the circuit court is affirmed (pp. 619, 620).

The correctness of the decisions that the law places a tax upon a legacy consisting of a vested interest upon its passage from the decedent to the trustee and

not at the time of payment by the trustee to the legatee is too apparent to be questioned. If that be true it follows, as the remainders of Alfred G. are vested, that the tax in this case attaches not at the time the legatee comes into possession or enjoyment of the remainder—that is, on its passage from the trustee to the legatee—but, on the contrary, at the time it vests in the legatee; that is, upon its passage from the decedent to the trustee.

Furthermore, it is proper to consider that this tax was imposed to raise war revenues. It was enacted to raise money for a necessity. Unless the language explicitly so provides, Congress can not be attributed with the inconsistent intentions of excluding from such an emergency tax both the legacies which pass from testators and vest in legatees before the passage of the act, but payment of which was deferred until after its passage, and also legacies which pass from testators and vest in legatees after its passage and while in force, but payment of which was deferred until the time subsequent to its repeal.

The circumstances surrounding, and the cause of, its enactment as well as the language of the statute itself are contrary to any such intention. The tax being commonly regarded as temporary, if vested remainers were not included in the provision, it would have been a simple matter for a testator wishing to evade the tax to postpone the payment of the legacy until its repeal. It would have afforded great opportunity to work fraud upon the Government. And

though a testator honestly makes such bequest it would be manifest injustice to reduce one legacy payable presently and leave intact a legacy vested now but payable in five years, simply because time of payment is postponed.

C. FEDERAL COURT DECISIONS HOLDING THAT VESTED REMAINDERS ARE TAXED UPON VESTING.

Land Title and Trust Co. v. *McCoach* (127 Fed., 381). The question involved in this case is set forth by the plaintiff in that case in part as follows:

> By said provision of said will the said George M. Troutman gave the entire net income of his residuary estate to his wife for life, and provided for the division of such income after her death among his descendants living at the time of her death. The interest of his said descendants in said residuary estate was therefore necessarily not vested but wholly contingent upon their surviving his said wife. Said wife is still living and said interests have therefore not yet vested.
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> On December 8, 1902, the defendant, claiming to act under and by virtue of the provisions of the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes" (United States Statutes at Large, Fifty-fifth Congress, Vol. XXX, p. 448, etc.), and of other acts of Congress, assessed upon the plaintiff, as trustee as aforesaid, an internal-revenue tax of $12,861.04 as the tax payable to the United States upon said estate under said act. In making up said assessment the defendant under-

took to value and assess for taxation the interests of the descendants of the said George M. Troutman in his residuary estate after the death of his wife, and included the amounts so ascertained in said assessment (p. 382).

The court, in passing upon the question, said:

To this statement the defendant has demurred, and the sole question for consideration is whether the beneficial interest given by the will to the testator's descendants is vested or contingent. If vested, the interest is taxed by section 29 of the war-revenue act of 1898 (p. 383).

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* * * I am of opinion that the remainder to the testator's descendants was vested, and not contingent, and therefore that the tax was properly levied (p. 386).

In the case of *Philadelphia Trust, Safe Deposit and Insurance Company* v. *McCoach* (127 Fed., 386) it was held, upon a statement of facts similar to that in the case of *Land Title and Trust Company* v. *McCoach*, the legacy tax was properly assessed and collected. The learned judge said:

* * * The only question to be decided is the nature of the interest in remainder thus given to the daughter. Is it a vested or a contingent interest? If vested, the tax was properly imposed; if contingent, the plaintiff should recover the sum unlawfully exacted (p. 387).

In these two cases the facts were analogous to those in the case now before the court, and it was clearly

held that the law of 1898 was intended to, and did, tax vested remainders at the time of vesting.

In the cases of *Brown* v. *Kinney* (128 Fed., 310) and *Peck* v. *Kinney* (128 Fed., 313) the statute of 1898 was again considered and was held to impose a tax upon vested remainders at the time of vesting.

D. SUCH A TAX RESULTS IN NO INJUSTICE.

This fact is pertinent to show the construction contended for by the Government is reasonable and equitable.

When the law of June 13, 1898, was reenacted March 2, 1901, the following clause was added:

> * * * Any tax paid under the provisions of sections 29 and 30 shall be deducted from the particular legacy or distributive share on account of which the same is charged. (31 Stat., p. 949.)

In the case of *United States* v. *Perkins* (163 U. S., 625) the question involved was whether or not personal property bequeathed by will to the United States is subject to an inheritance tax under the law of the State of New York. The Supreme Court of the United States in passing upon the question said:

> That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, *Matter of the Estate of Swift* (137 N. Y., 77), in which it is said (p. 85) that "the effect of this special tax is to take from the property a portion, or a percentage of it, for the use of the State, and I think it quite immaterial whether the tax can be precisely classified with

> a taxation of property or not. It is not a tax upon persons."
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> We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the Government. The legacy becomes the property of the United States only after it has suffered diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it (pp. 629, 630).

In *Plummer* v. *Coler* (178 U. S., 115) the court decided that the fact that property taxed under the inheritance tax laws of the State of New York included United States securities does not invalidate the law. Referring to the case of *United States* v. *Fox* (94 U. S., 315) the court said:

> One of the propositions recognized in that case applicable to the present one is that a State tax that would be invalid if imposed directly on a legacy to the United States may be valid if the amount of the tax is taken out of the legacy before it reaches the hands of the Government, the theory of such a view apparently being that the property rights of the Government do not attach until after the tax has been paid or until the condition imposed by the tax law of the State has been complied with (p. 132).

In *Snyder* v. *Bettman* (190 U. S., 249) it was held that the United States may collect taxes upon a legacy to a municipal corporation of a State for a corporate or

public purpose, under the law of June 13, 1898. The court said:

> Conceding fully that Congress has no power to impose a burden upon a State or its municipal corporations, the question in each case is whether the tax is direct or incidental; since we have had frequent occasion to hold that the imposition of a tax may directly affect the value of property to the amount of the tax without being legally objectionable as a direct burden upon such property.
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> * * * As the tax in the case under consideration is collected from the property while in the hands of the executor (sec. 30), who is required to liquidate it "before payment and distribution to the legatees," we do not regard it as a tax upon the municipality, though it may operate incidentally to reduce the bequest by the amount of the tax. Such incidental effects are common to many, if not all, forms of taxation—indeed, it may be said generally that few taxes are wholly paid by the person upon whom they are directly and primarily imposed (p. 253.)

It is evident therefore that no hardship is imposed upon Alfred G. Vanderbilt nor anyone else, nor is there any unreasonableness in attributing to Congress the intent to assess and collect taxes upon vested remainders at the time of vesting. The Supreme Court of the United States has held that the legacy tax is not imposed upon persons; the recipient is not taxed, and no hardship can be put upon him, since it is not his

property until it has suffered diminution of the tax. The tax is paid only out of the legacy funds, and no case can arise where a person will be obliged to pay a tax upon a legacy he will never receive. As said by the New York court of appeals regarding this very legacy:

> Whoever may ultimately take the property takes that which remains after the payment of the tax.

In the present case, if the law had been continued in force and Alfred Vanderbilt reaches the age of 35, no injustice will have been done him by the collection of the tax at the time of the death of the testator. If he dies before reaching that age his heirs, if he has any, or if not, Reginald, will receive the legacy, diminished by the amount of the legacy tax. In any event the tax is to be paid out of the legacy, and in no case is a tax to be paid by a person not receiving a legacy. No injustice, therefore, is put upon anyone.

It is true that if the tax is imposed upon these interests at the time of vesting, rather than when they vest in possession or enjoyment, the legatee is poorer by the amount of interest that the tax would earn in the interim. But this is not an injustice or a hardship, unless a legacy tax of all kinds is. It is a very small portion of the legacy, and a necessary incident of taxing vested remainders. In the present case the interest money would amount to considerable, but the principal of the legacy is nearly nineteen millions of dollars. Furthermore, New York, after trying different schemes, has

concluded to, and now does, tax vested remainders at the time of vesting. It has collected the State tax on the interests now called into question. The legislators of that State do not regard it an injustice or hardship, for if they did such laws would not be left in the statutes. We find legislators of other States, among which are Connecticut, Maine, Massachusetts, Ohio, etc., making similar provisions to tax vested remainders at the time of vesting. No more convincing evidence of the justice of interpreting this law to impose a tax as the Government now contends for, could be produced. If plaintiff's contention that a tax should not be paid until an interests vests in possession or enjoyment is followed to its logical end, it answers itself. His theory leads us naturally to conclude that the income should not be taxed until it was actually earned and ready to be paid over to him. The income he will receive in his thirtieth year is no more vested in possession or enjoyment than is the principal that will be paid him when 30 or 35. Both are subject to be divested if he dies before reaching that age. His arguments in support of his contention that vested remainders should not be taxed before vesting in possession or enjoyment, apply with equal force to the same conclusions about the income. Plaintiff has recognized the absurdity of that position, and paid without protest a tax upon all the income to be earned until he is 30 years old. Has he not, then, paid upon an interest that will never come to his hands if he dies before reaching the age of 30? And finally, has he not admitted, by paying the tax on the income, that

he will reach the age of 30 in the logic of events, when half the principal will be paid him, the tax upon which he now denies the right of the United States to collect?

E. CONSTITUTIONAL UNIFORMITY PROVISION NOT VIOLATED.

To construe the act as taxing vested remainders at the time of vesting, and not awaiting the time the legatee comes into possession or enjoyment of the same, does not violate the constitutional requirement that the tax shall be uniform. This question arises only in case the character of a remainder, i. e., whether it is contingent or vested, is to be determined in accordance with the law and decisions of the several States. Assuming the determination will be made in this way, there is no violation of this constitutional provision.

Decisions of the United States Supreme Court in two analogous cases establish this. In *Knowlton* v. *Moore* (178 U. S., 41) Mr. Justice White said:

> Thus, it is apparent, that the expression "uniform throughout the United States" was at that time considered as purely geographical, as being synonymous with the expression "general operation throughout the United States," and that no thought of restricting Congress to intrinsic uniformity obtained, since the powers recommended were absolutely in conflict with such theory.
>
> * * * * * * * * * Giving to the term uniformity as applied to duties, imposts, and excises a geographical significance, likewise causes that provision to look to the forbidding of discrimination

as between the States by the levying of duties, imposts, or excises upon a particular subject in one State and a different duty, impost or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes. And the conclusion that the possible discrimination against one or more States was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts, and excises, is greatly strengthened by considering the state of the law in the mother country and in the colonies, and the practice of taxation which obtained at or about the time of the adoption of the Constitution.

* * * * *

It is yet further asserted that the tax does not fulfill the requirements of geographical uniformity for the following reason: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it can not operate with geographical uniformity inasmuch as testamentary and intestacy laws may differ in every State. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the States may obtain as to the objects upon which the tax is levied. The proposition, in substance, assumes that the objects taxed by duties, imposts, and excises must be found in uniform quantities

and conditions in the respective States, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States. Indeed, the contention was substantially disposed of in the *License Tax cases* (5 Wall., 472), previously referred to. It was there urged that, as the several States had the right to forbid the carrying on of the liquor traffic, therefore Congress had no power to license such traffic, because it would interfere with the authority of the State. It was held that the license was validly imposed, that it did not interfere with the power of the States to prevent the liquor traffic, because in a State where such traffic was forbidden the license would be inoperative; but in the States where such traffic was allowed the license would be effective. The argument, however, is additionally fully answered by the review which we have made of the origin and meaning of the expression "uniform throughout the United States." From that review it appears that the very objection upon which the proposition now advanced must rest was urged in the Continental Congress as the reason why the levy of uniform duties, imposts and excises throughout the United States should not be authorized. This is shown by the objection of Mr. Rutledge and the suggestion of Mr. Lee. It is further shown by the protest of Rhode Island, and the

reasons advanced why a duty on salt should not be levied. But it was seen that if it were required, not only that the duties, imposts, and excises should be uniform throughout the United States, but that in imposing them objects should be selected existing in equal quantity in the several States, the grant of power to levy duties, imposts, and excises would be a failure. In the convention which framed the Constitution the same argument was used without success, and, as we have seen, the only ground upon which the striking out of the words "and equal" after the word "uniform," in the adoption of the clause as now found in the Constitution, can be reasonably explained, is that it was done to prevent the implication that the duties, imposts, and excises, which were to be uniform throughout the United States, were to be placed upon rights equally existing in the several States. To now adopt the proposition relied on would be virtually, then, to nullify the action of the convention, and would relegate the taxing power of Congress to the impotent condition in which it was during the Confederation (pp. 98, 89, 107).

In the *License Tax cases* (*supra*), the court said:

> With this course of legislation in view, we can not say that there is anything contrary to the Constitution in these provisions of the recent or existing internal-revenue acts relating to licenses.
>
> * * * * *
>
> We conclude—
>
> * * * * *

> That the recognition by the acts of Congress of the power and right of the States to tax, control, or regulate any business carried on within its limits, is entirely consistent with an intention on the part of Congress to tax such business for national purposes (pp. 472, 475).

In *United States* v. *Singer* (15 Wall., 111), the court considered the constitutionality of the act of Congress imposing a tax upon dealers in liquor, and among other things said:

> The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be "uniform throughout the United States." The tax here is uniform in its operation—that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike (p. 121).

It has, therefore, been held that the constitutional provision as to uniformity has not been violated by the present law because of the fact that a testator's estate may yield different taxes in different States dependent upon the intestate laws of the States. Also, that a tax imposed by the United States upon liquor traffic does not violate that section although the States may, and in some instances do, prohibit absolutely the liquor traffic within their borders.

It follows that the determination of what is a vested or a contingent remainder according to State law in

imposing the legacy tax does not infringe the Constitution. The uniformity clause is satisfied by having a tax attach wherever a vested remainder is found.

The language of Mr. Justice Miller in the *Head Money Cases* (112 U. S., 580) is appropriate:

> The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation is uniform and operates precisely alike in every port of the United States where such passengers can be landed.
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> * * * * *
>
> * * * Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once (pp. 594, 595).

F. SUBSEQUENT LEGISLATION OF CONGRESS.

Legislation subsequent to the act of June 13, 1898, indicates the intention of Congress to tax remainders when they become vested. That law was repealed by act of April 12, 1902, to take effect July 1. The law of June 27, 1902, known as the refunding act, provides in part:

> SEC. 3. That in all cases where an executor * * * shall have paid or shall hereafter pay any tax upon any legacy or distributive share of personal property under the

> provisions of the act of June 13, 1898 * * * the Secretary of the Treasury be, and he is hereby, authorized and directed to refund * * * so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July 1. And no tax shall hereafter be assessed or imposed under said act * * * upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July 1. (32 Stat., 406.)

Congress here recognized that vested remainders were taxed by the law of 1898, for otherwise this act would have been unnecessary. The first clause in effect states that all contingent beneficial interests which have or may become vested, regardless of the time that they may take effect in possession or enjoyment, shall be taxed, and then provides that money shall be refunded in cases where parties have anticipated the tax by paying it upon a contingent interest before its vesting, and which would not vest until after the 1st of July, 1902. The second clause goes a step further and in effect provides that although contingent beneficial interests may have become vested before July 1, that unless the tax has been assessed or imposed prior to that date it shall not be demanded if the right to the possession or enjoyment of the interest shall not occur prior to July 1. A tax could not be collected upon a legacy unless the tax accrued before the repealing act took effect; if, therefore, a vested

remainder was not taxable under the law of 1898, until the legatee was in possession or enjoyment of the same, what need of this act of 1902?

G. NEW YORK STATE DECISIONS UPON THE STATE INHERITANCE TAX LAW.

Counsel for the plaintiffs in this case in their brief in the district court said, that "the New York inheritance tax is widely different in language and stands upon an entirely different footing from the legacy tax, and consequently that the decisions of the New York State courts on the cases under the State laws have very little if any bearingon the questions presented under the Federal act," and that "the decisions of the New York State courts can not be relied upon as authorities in aid of the construction of the" Federal statute, but he has nevertheless quoted extensively from these decisions in his brief in this court. His purpose in doing so is principally to show that the State court of appeals regarded it an unreasonable and inequitable construction to give a statute, unless necessitated by its language, that vested remainders should be taxed at the time of vesting. A brief review of these decisions will show them inapplicable, and that such a construction is not regarded as necessarily unreasonable.

In *Matter of Curtis* (142 N. Y., 219) the facts being that a testator left property in trust for the benefit of her two daughters and two grandchildren for their respective lives, with the remainders in fee to her nephews and nieces living at the time of the successive termination of each, the court held that under the law of 1885

a tax could not be assessed or collected until the death of life tenants. The decision has no application to the United States statute, for the New York State statute has, among other provisions, one which the court, in the *Matter of Stewart* (131 N. Y., 274), referred to in the following language:

> Section 13 is a general section prescribing the method of appraising and valuing property subject to the payment of a tax under the act. By that section the surrogate is authorized to appoint an appraiser of such property "as often as and whenever occasion requires," who, at the time and place appointed, of which notice is to be given, shall "appraise the same at its market value," and make his report, from which the surrogate shall "forthwith assess and fix the then cash value of all estates, annuities, and life estates, or terms of years growing out of said estate and the tax to which the same is liable." It is to be noticed that this section does not, as does the second section, require the valuation to be made immediately upon the death of the decedent; on the contrary, it contains the significant words that an appraiser may be appointed "as often as and whenever occasion may require." Nor does section 13 prescribe that the property appraised thereunder shall be appraised "at what was the fair market value thereof at the time of the death of the decedent," as is required in the cases falling under the second section. Under section 13 the appraiser is to appraise the property "at its fair market value," and the surrogate, on the coming in of the report, is to assess

and fix the "then cash value" of all estates, etc., upon which the tax is chargeable.

* * * * *

* * * But we think that the thirteenth section does include cases like the present, and that contingent interests given by a will, which after the death of the testator are converted, by the happening of the event upon which they are limited, into actual vested estates, may then be appraised and taxed under the provisions of section 13 (pp. 283, 284).

Referring to the Stewart case the court here says:

It does decide that contingent interests although vesting in possession at a future day may be at once valued and assessed, and that such interest vesting in no specific beneficiary when the will takes effect can not then be taxed, but comes under the operation of the law when the event which locates and fixes them occurs;

and then adds—

* * * It may possibly be that where the only contingency of the future is upon which of several named persons or classes of persons all of whom are liable to suffer the taxation the beneficial interests will ultimately devolve, the appraisal and assessment need not be postponed, though even that is hardly a prudent construction, but need not now be discussed, yet where the contingency touches the taxable character of the succession, where it is only in the chance of uncertain events that the beneficial interests will finally alight where they will be taxable at all, a delay until the contingency is solved is both just and necessary (p. 224).

This latter quotation clearly shows the decision inapplicable to the facts in the case now under consideration.

In *Matter of Roosevelt* (143 N. Y., 120), on a statement of facts materially like that in *Matter of Curtis* and basing its conclusions upon that case, the court held the act of 1887 did not impose a tax on annuities and remainders to nieces and nephews of testator limited upon a life estate to his wife, at death of testator, but it was necessary to await death of the wife before it could be assessed and collected. The inapplicability of the decision and remarks of the court made therein to this case are shown by the fact that the law of 1887 is not materially different from that of 1885 and section 13 of both laws is the same.

The act of 1892 was considered in *Matter of Hoffman* (143 N. Y., 327). There testator gave property in trust for the benefit of her mother for life, after her death to E. for life, the principal to be paid to the issue of E. The court held the remainders were not to be taxed before the death of the persons holding preceding life interests. But the law of 1892 is so materially different from the Federal statute as to make the remarks of the court in that case wholly inapplicable. Section 22 of the State law provides in part:

> * * * The word transfer, as used in this act, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future.

Relative to this section the court in the Hoffman case says:

> * * * My judgment is further guided by the very significant definition of the word "transfer" in section 22. It "shall be taken to include the passing of property or any interest therein in possession or enjoyment present or future." It thus contemplates a present enjoyment or a fixed and absolute right of future enjoyment, and adjourns the appraisal until the fulfillment of contingencies leaves those results attained (p. 335).

And in *Matter of Roosevelt* (143 N. Y., 120) it is said:

> The legislature in the act of 1892 has given a practical construction to its previous legislation on this subject when it provides that where the fair market value of the property or interest can not be ascertained at the time of the transfer, the tax shall become due and payable when the beneficiary shall come into actual possession or enjoyment. (Chap. 399, Laws 1892.)

The decision in the case of *Matter of Seaman* (147 N. Y., 69) is favorable to the Government's contention in this case.

S. died in 1876, giving the residue of his estate in trust, the income to be paid E. S. for life, and upon her death one-half the trust fund to be paid the children of G. S., the other half to be held in trust for G. S., and upon his death to be paid his children. Both life tenants died in 1893. Four children of G. S. were living in 1876 and 1893, and the question was—

> * * * whether that vesting in possession which occurred after 1892 is a transfer or suc-

cession then for the first time passing, and so taxable under the act; or, if not then first occurring, is at least made taxable by the explicit language of the statute.

The court held the remaindermen's interests were not taxable, and said:

It is obvious that a right of succession to the estates in remainder passed at once on the death of the testator to the four children and was a vested interest, although subject to be defeated or modified by subsequent contingencies. If the inheritance-tax law had been in existence at the date of the testator's death, these interests would have been taxable at once in the sense that the incumbrance of the right of the State would immediately attach. We have held that the tax is not upon the property which is transferred, but upon the right of succession which passes to the successor. (Matter of Swift, 137 N. Y., 88.) A right of succession passed to the four living children of George at the death of the testator. It came from him; it was transferred by him; taking effect at his death, and passed then or never. But the right itself, although vesting in the successors at once had its own peculiar character. It could not ripen into possession or enjoyment until the death of the life tenants, and before that event was contingent solely as to the persons who should eventually take and the proportions to be observed. The legatees as a class were certain, the particular individuals were alone uncertain.

But in just such a case difficulties arose in respect to the application of the inheritance-tax law, and received their solution in the case of *Curtis* (142 N. Y., 219). There, as here, a right of succession passed by the will, and at the date of the death of the testatrix, but was contingent as to the specific legatees; and it was seen that the immediate assessment and collection of a tax was impossible, because, as the law then stood, the succession of the children was exempt while the substituted succession of the nephews and nieces would be taxable, and we determined that the State must wait for the collection of its tax until the contingency was settled. I sought in that case to free the subject from the nice and difficult questions which attend the construction of wills, but desirable as the result is, I am less confident than I was then of our ability to accomplish it.

* * * * *

* * * The doctrine of the case and its manifest trend was that where the particular persons who were to have the beneficial possession were uncertain, the appraisal and collection must be adjourned until the uncertainty ended, but no new doctrine of the passing of the right of succession at a date later than that of the will was at all asserted.

* * * * *

In addition, it should be observed that the statute draws the distinction between the passing of the right of succession and the subsequent enjoyment, or termination of a defeasible quality. The right of the state attaches when the right of succession accrues, but may not

be enforced in advance of that future possession and enjoyment, or indefeasible ownership, which identifies the persons who ought to pay (pp. 74, 75, 76, 78).

The decision in *Matter of Davis* (149 N. Y., 139) likewise supports the position of the Government in this case and may be regarded as superseding many remarks of the court in cases of *Matter of Curtis*, *Matter of Stewart*, *Matter of Roosevelt*, and *Matter of Hoffman*.

The facts in this case were, H. died in 1887, giving her property to her sister for life, remainder to children of her sister.

> The appellant contends that the estate or property devised to the respondent was not liable to assessment or taxation at the date of the death of the testatrix, but became so upon the death of the respondent's mother, and that it is of no consequence, so far as the question of taxation is concerned, whether the respondent's interest technically vested on the death of the testatrix in 1887, or upon the death of Mrs. Ingraham in 1894. He, however, admits that the estate or interest devised to the respondent was liable to be defeated by her death previous to that of her mother, and, therefore, that it was not certain until her death that the respondent would enjoy any part of the estate of the testatrix, although she had a vested interest in it. The facts thus admitted bring this case within the principle of the *Matter of Seaman* (147 N. Y., 69).

* * * * *

* * * Following the doctrine of that case, the value of the respondent's estate in remainder as of the time of the death of the testatrix was the sum upon which the tax should have been assessed.

It has often been held by this court that the tax imposed is not a tax upon property, but upon the right of succession, and hence the true test of value by which the tax is to be measured is the value of the estate at the time of the transfer of title, and not its value at the time of the transfer of the possession. The value of the particular estate transferred may increase or be diminished during the time which intervenes between the passing of the title and acquiring possession by the beneficiary, but we think that circumstance does not affect the value of the estate as a basis upon which the tax is to be imposed. Whatever of confusion exists in the authorities upon the subject seems to be due to a failure in some of the cases to properly distinguish between the time when, in a given case, the title passed and the time when the legatee became entitled to the possession of his estate under the will. Where the estate transferred has a fixed or ascertainable value at the time of the death of the grantor, testator, or intestate the value at that time must be the basis of the appraisal whenever made; but if the person to whom the property passed can not be known until the death of the life tenant, the tax can not be imposed until after that event. Hence, the appellant's contention that the interest of the respondent was to be appraised as of the time when she acquired

possession of the estate, can not be sustained (pp. 545, 546, 547).

The case now under consideration has been adjudicated with reference to the New York statutes. *Matter of Vanderbilt* (172 N. Y., 71). Mr. Justice Haight said:

> * * * The legislature, by chapter 76 of the laws of 1899, amended section 230 of the tax laws, known as chapter 908 of the laws of 1896, by which the provision of the statute quoted is omitted and in place thereof we have the following: "Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable." Then follow provisions particularly specifying the manner in which the value of future or limited estates shall be determined. Then it is provided that "When property is transferred in trust or otherwise, and the rights, interests, or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, *out of the property transferred*."
>
> It seems to me clear that the legislature by this amendment intended to change the law upon the subject and to make the transfer tax upon property transferred in trust payable

> forthwith. The tax is not required to be paid by the conditional transferee, for, by the provisions of the statute, it is to be paid "out of the property transferred." So that whoever may ultimately take the property takes that which remains after the payment of the tax. This amendment makes provision for property transferred in trust. It, therefore, contemplates defeasible transfers as well as absolute transfers.

This review of the New York decisions shows that, because of section 13 of the laws of 1885, a similar section in the law of 1887, section 22 of the law of 1892, and chapter 76 of the laws of 1899, the plaintiff's contentions in applying these decisions are erroneous.

II. TAX COLLECTABLE WHEN REMAINDER VESTS.

Much has already been said to indicate that the tax is to be assessed and collected at the time of vesting.

Extended discussion is unnecessary, for if there was ever any doubt as to the time when a tax upon vested remainders should be collected, if such remainders were taxable at all, it was definitely settled by the amendment in the act of March 2, 1901, providing:

> * * * that the tax or duty aforesaid shall be due and payable in one year after the death of the testator.

III. THE INTERESTS OF ALFRED G. VANDERBILT HERE INVOLVED ARE VESTED REMAINDERS.

A. FEDERAL CASES.

A review of the decisions of the United States Supreme Court indicates that the interests of Alfred G.

Vanderbilt, which are brought into question, must be regarded as vested remainders.

Price v. *Watkins* (1 Dallas, 8):

> Devise of land, after the decease of the wife of the testator, to sell and to divide the proceeds among his children, afterwards named, when they attained severally the age of 21, or married; A., one of the children, attained the age of 21 and died in the lifetime of the widow, and before sale: Held that the legacy was vested.
>
> Special verdict: The question arose on these words of a will. "*Item*—My will is, that after my wife Ruth Price's decease, or if she shall alter her condition and marry, then, in such case, I devise and bequeath unto my loving friends, I. W. and M. K., or to any one of them, in case the other should die, in trust, and for the intent to sell and convey, all that messuage, etc., to any person or persons that shall purchase the same, and the money arising from the sale of the premises shall be divided between my children hereinafter named, when they attain severally to the age of 21 years, or be married, which shall first happen." Samuel Price, one of the children, attained the age of 21 years and married, and afterwards died intestate and without issue, in the lifetime of the testator's widow Ruth Price, who did never marry again. Then the widow died, and after her death, the trustees sold, and the administratrix of Samuel brings this suit for Samuel's proportionable part of the money arising from the sale of the house. And the question was, whether this

was a vested legacy to Samuel, or whether it was lapsed, by his dying before the trustees had power to sell, to wit, in the lifetime of the testator's widow?

For the *plaintiff*, it was urged that land ordered to be sold and converted into money was to be considered as personal estate. That this land was to be sold at all events, so there was no contingency. That both events to make a vesting in Samuel had happened, to wit, attaining the age of 21 and marrying; and that this case was exactly similar to the case of *King* v. *Wilkes*, Talbot's Cas., 117. Besides which, many other cases were cited for the plaintiff, viz, 2 Vern., 536; 1 P. Wms., 109; 2 id., 320; 2 Abr. Cas. Eq., 548; 2 Vent., 347; 2 Vern., 758, 766; 4 Bac. Abr, 308; 2 Vent., 366; 2 Vern., 72, 348, 424; 2 Abr. Cas. Eq., 654.

For the *defendant*, it was said, that in legacies to be raised out of land, the time of payment is the time of vesting. That in this case, the land could not be considered as personal estate till the trustees had power to sell it, which was not until after the widow's death, and that Samuel dying before, his legacy was lapsed and would merge for the benefit of the heirs. And the case of *Oads* v. *Ferry* was much relied on, Vin., Devise, 383. The other cases cited for the defendant were 2 Vern., 92, 416, 208; 2 P. Wms., 276, 610, 484; 3 id., 20.

But the court were clearly of opinion that it was a *vested* legacy, and judgment was given for the plaintiff.

Carver v. *Astor* (4 Pet., 1):

> The uses declared in a deed of marriage settlement were: To and for the use of "Joanna Philipse and Beverly Robinson (the releasees) and their heirs, until the solemnization of the said intended marriage, then to the use and behoof of the said Mary Philipse and Roger Morris, and the survivor of them, for and during the time of their natural lives, without impeachment of waste; and from and after the determination of that estate, then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her, or their assigns forever; * * *

The court, speaking through Mr. Justice Story, held the remainder to the children was a vested remainder, and in passing upon this point said:

> * * * There is a clear remainder in fee to the children, which ceased to be contingent upon the birth of the first, and opened to let in the after-born children. (See *Doe* v. *Perryn*, T. R., 484; *Doe* v. *Martin*, 7 ibid., 83; *Bromfield* v. *Crowder*, 4 Bos. & Pul., 313; *Doe* v. *Provoost*, 4 Johns., 61.) It is perfectly consistent with this limitation that the estate in fee might be defeasible and determinable, upon a subsequent contingency, might pass by way of shifting executory use (as it might in case of a devise by way of executory devise) to other persons in fee, thus mounting a fee upon a fee. The existence then of such executory limitation over, by way of use, would not change the nature of the preceding limitation and make it contingent

any more than it would in the case of an executory devise. The contingency would attach, not to the preceding limitation, but to the executory use over.

* * * * *

* * * The general rule of law, founded on public policy, is that limitations of this nature shall be construed to be vested, when and as soon as they may. The present limitation, in its terms, purports to be contingent only until the birth of a child, and may then vest. So that, whether we consult the language of the settlement, the order of its provisions, the apparent intention of the parties, or the general rule of law, they all lead to the same results—that the estate to the children was contingent only until their birth; and that when the act of 1779 passed, they being all then born, it was a vested remainder in them and their heirs, and not liable to be defeated by any transfer or destruction of the life estate (pp. 89, 90, 92).

The case of *Carver* v. *Astor* was reviewed in the case of *Crane* v. *Morris* (6 Pet., 598), and the conclusions of the former case were reaffirmed in the latter

Croxall v. *Shererd* (5 Wall., 268). Robert M. deeded certain land to parties in trust, the use to Charles and Mary Croxall or the survivor for life; the use then to the heirs of the body of Mary by Charles. Thomas was a child of Mary and Charles.

The court, *inter alia:*

It is said also that the remainder to Thomas Croxall was contingent and expectant until the death of his father and mother; that nothing

passed by his deed to Wall, and that the statute could not, under these circumstances, affect the rights of his heir in tail. Laying out of view the act of the legislature of 1818, and what was done under it, this is still an erroneous view of the subject. Thomas was living at the time of the execution of the deed of 1793, and took at once an estate vested in right, and deferred only as to the time of possession and enjoyment. It was in the latter respect only contingent and expectant. If this were not so, upon the death of the remainderman before the vesting of the possession, his children could not inherit.

The struggle with the courts has always been for that construction which gives to the remainder a vested rather than a contingent character. A remainder is never held to be contingent when, consistently with the intention, it can be held to be vested. If an estate be granted for life to one person, and any number of remainders for life to others in succession, and finally a remainder in fee simple or fee tail, each of the grantees of a remainder for life takes at once a vested estate, although there be no probability, and scarcely a possibility, that it will ever, as to most of them, vest in possession.

Chancellor Kent says the definition of a vested remainder is thus fully and accurately expressed in the Revised Statutes of New York. It is "when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate precedent estate."

It is the present capacity to take effect in

possession if the precedent estate should determine which distinguishes a vested from a contingent remainder. Where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to the future possession vests at once in such as are living, subject to open and let in after-born children, and to be divested as to those who shall die without issue. A remainder, limited upon an estate tail, is held to be vested, though it be uncertain whether it will ever take effect in possession. A vested remainder is an estate recognized in law, and it is grantable by any of the conveyances operating by force of the statute of uses.

Such an estate, if the entail had not been destroyed, passed by the deed of Thomas Croxall to Morris Croxall, by the deed of Morris Croxall to Garrett D. Wall, and by the deed of Wall to the defendant, Shererd. (P. 287, 288.)

In *Doe* v. *Considine* (6 Wall., 458) the will involved provided in part as follows:

I give and devise unto my sons-in-law, William Barr, James Keys, and John B. Enness, of Cincinnati, aforesaid, and to their heirs, all and singular, that certain farm, tract, or parcel of land, situate, lying, and being in the county of Hamilton, State of Ohio, which I purchased of John Cross, containing one hundred and sixty acres, to hold the same premises to them, and their heirs in trust (first), for the use of my son, John M. Barr, during his natural life; but, nevertheless, to permit and suffer my son, John M. Barr, to hold, use, occupy, possess, and

enjoy the said farm, and to receive and take the rents and profits thereof, during his natural life. And in case my said son, John M. Barr, should die leaving a legitimate child, or children, then, also, in trust for Maria Barr, wife of the said John M. Barr, in case she survive him, during her natural life, for the purpose of maintaining herself and the said child, or children, and educating the said children; but, nevertheless, to permit and suffer the said Maria Barr, wife of the said John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof during her natural life. And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him; if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child, or children, of the said John M. Barr, and their heirs forever.

* * * * *

John M. Barr having died leaving no issue but Mary Jane Barr, and she having died in infancy, unmarried, and the life estate of her mother, Maria Barr, having terminated by the death of that person, the question was presented, In whom is vested the title to the premises in controversy?

* * * * *

Mr. Justice Swayne said:

A vested remainder is where a present interest passes to a certain and definite person, but to

be enjoyed in futuro. There must be a particular estate to support it. The remainder must pass out of the grantor at the creation of the particular estate. It must vest in the grantee during the continuance of the estate or *eo instanti* that it determines.

A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event.

A contingent remainder, if it amount to a freehold, can not be limited on an estate for years, nor any estate less than freehold. A contingent remainder may be defeated by the determination or destruction of the particular estate before the contingency happens. Hence, trustees are appointed to preserve such remainders.

* * * * *

The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested.

It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary. (See authorities cited.)

Adverbs of time—as where, there, after, from, etc.—in a devise of a remainder are construed to relate merely to the time of the enjoyment of the estate, and not the time of vesting in interest. (See authorities there cited.)

Where there is a devise to a class of persons to take effect in enjoyment at a future period,

the estate vests in the persons as they come *in esse*, subject to open and let in others as they are born afterward. (See authorities there cited.)

An estate once vested will not be devested unless the intent to devest clearly appears.

The law does not favor the abeyance of estates, and never allows it to arise by construction or implication.

"When a remainder is limited to a person *in esse and ascertained*, to take effect by *express limitation*, on the termination of the preceding particular estate, *the remainder is unquestionably vested*."

This rule is thus stated with more fullness by the supreme court of Massachusetts. "Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event *that must unavoidably happen by the efflux of time*, the remainder vests in interest as soon as the remainder-man is *in esse* and ascertained, provided that nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession; yet if the estate is limited over to another in the event of the death of the remainder-man before the determination of the particular estate, his vested estate will be subject to be devested by that event, and the interest of the substituted remainder-man, which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder." (*Blanchard* v. *Blanchard*, 1 Allen, 227.)

Mary Jane Barr was, at the death of the testator, within every particular of the category, which, according to the authorities referred to, creates a vested remainder.

1. The person to take was *in esse*.

2. She was ascertained and certain.

3. The estate was limited, to take effect in her absolutely upon the death of her father.

4. That was an event which must unavoidably happen by the efflux of time.

5. Nothing but her death, before the death of her father, would defeat the remainder limited to her.

6. She had a fixed right of property on the death of the devisor. The period of enjoyment only was deferred and uncertain.

7. The time of enjoyment in possession depended upon the death of her mother. The right was in nowise dependent on that event.

8. Upon the death of her father, she surviving him, her estate before defeasible, became indefeasible and absolute.

We are thus brought to the conclusion, upon technical as well as untechnical grounds, that Mary Jane Barr had, at the time of her death, an indefeasible estate of remainder in fee in the premises in controversy (pp. 459, 460, 474, 475, 476, 478, 479).

Cropley v. *Cooper* (19 Wall., 167):

Mr. Justice Swayne delivered the opinion of the court.

This case turns upon the following clause of the will of William Cooper, deceased:

"To my daughter, Elizabeth Cropley, at her

mother's death, I give and bequeath the rent of my house on Pennsylvania avenue in the city of Washington, situated on square ——, for and during her life; and at her decease it is my will that the said —— be sold, and the avails therefrom become the property of her children or child, when he, she, of they have arrived at the age of 21 years, the interest in the meantime to be applied to their maintenance."

The testator died in 1845. He left at his decease a widow, Sarah Cooper, and four children, William, John, Joseph, and Elizabeth, the complainant. William and Joseph were married and had children. John was unmarried. Elizabeth was intermarried with Richard Cropley, and had living one child, William Cooper Cropley, then about 3 years old. Shortly after the testator's death, Elizabeth gave birth to a daughter, who died in early infancy. Richard Cropley, the husband of Elizabeth, died in 1851. Her mother died in 1854. Her son, William Cooper Cropley, died in 1870, at the age of 28 years, not having married. After his death, Elizabeth Cropley, the complainant, then 56 years of age, claimed to own the house on Pennsylvania avenue devised to her for life. Her brothers, William, John, and Joseph, set up claims as heirs at law of their father, alleging that the bequest to the children of Elizabeth had failed by reason of the death of both of them before the death of their mother, and of the younger one before reaching the age of 21 years. The complainant thereupon filed this bill to obtain a construction of the will, and to ascertain her rights.

The question presented for our determination is, whether the bequest to her children lapsed, as is insisted by the appellees; or, in other words, whether it was vested or contingent.

* * * * *

The real estate having been directed by the will to be converted into money, it is to be regarded for all the purposes of this case as if it were money at the time of the death of the testator.

* * * * *

Where a bequest is given by a direction to pay when the legatee attains to a certain age, and the interest of the fund is given to him in the meantime, this shows that a present gift was intended, and the legacy vests in interest at the death of the testator.

A bequest in the form of a direction to pay at a future period vests in interest immediately if the payment be postponed for the convenience of the estate or to let in some other interest. The payment of debts is an instance of the former, and a prior temporary provision for some other person, as for Elizabeth Cropley in this case, is an instance of the latter. In all such cases it is presumed that the testator postponed the time of enjoyment by the ultimate legatee for the purpose of the prior device or bequest.

A device of lands to be sold after the termination of a life estate given by the will, the proceeds to be distributed thereafter to certain persons, is a bequest to those persons and vests at the death of the testator.

* * * * *

Boraston's case was referred to by counsel on both sides. The point there ruled was as follows: If real estate be devised to A when he shall attain a given age, and until A attains that age the property is devised to B, A takes an immediate vested estate, not defeasible on his death under that age; the gift being read as a devise to B for a term of years, with remainder to A. The same doctrine has since been affirmed in numerous other cases, and is now a canon of the English law. Boraston's case related to real property. If this were such a case it would be in point and conclusive. It has been applied by American courts to bequests of personality. The subject of vested and contingent remainders was examined by this court in *Poor* v. *Considine.*

Chancellor Kent says: "It is the uncertainty of *the right* of enjoyment and not the uncertainty of *its actual enjoyment* which renders a remainder contingent. The present capacity of taking effect in possession, if the possession become vacant, distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues."

When a remainder is limited to a person in esse and ascertained to take effect by words of express limitation on the determination of the preceding particular estate, this remainder is *most clearly and unquestionablg vested.*

* * * * *

We hold that William Cooper Cropley took a vested interest in the bequest in question at the death of the testator, but subject to open and let

in after-born children, and to take effect in enjoyment at the death of his mother; that his sister, at her birth, took a like vested interest to the extent of a moiety; that at her death her right passed to him as distributee, according to the Statute of Distribution of Maryland; that at his death all his right passed to his mother, the complainant, as a like distributee under the same statute. If the property shall be sold at her death all the avails will go to her legal representative. She may dispose of them in advance by will, or leave them to be distributed according to the statute (pp. 171, 174, 176, 177).

Daniel v. *Whartenby* (17 Wall., 639). The testator gave his real and personal property to his son Richard "during his natural life, and after his death to his issue lawfully begotten of his body, such issue, their heirs and assigns forever."

The court held:

* * * The estate given to the children of Richard was a contingent remainder. Upon the birth of the first child it would have vested, but subject to open and let in after-born children.

* * * * *

* * * upon the death of Richard, with the possibility of issue extinct, the devise to James became a remainder in fee simple vested at once in interest, but deferred as to the period of enjoyment until the termination of the intermediate life estates. *Doe* v. *Howell*, 10 Barnewall & Cresswell, 196; *Doe* v. *Howell*, 5 Manning & Ryland, 24 (p. 647).

Clapp v. *Mason* (94 U. S., 589). The testator died in 1867 and devised real estate to his widow for her life with remainder over to B. The widow died in 1872. In passing upon the question whether or not the internal-revenue tax could be legally assessed under the act of 1864, as amended by the act of 1866, the court said:

> By section 127 it is provided that any disposition by will or deed or descent, by reason whereof any person shall become beneficially entitled in possession or expectancy to any real estate or any interest therein upon the death of any person, shall be deemed to confer a succession. The argument made upon this section by the plaintiff in error that the will of Mason conveyed an estate to William P. Mason and Charles H. Parker, and that, although they were not entitled to immediate possession they had a vested estate, and that the succession to such an estate was made taxable, we readily admit.

McArthur v. *Scott* (113 U. S., 340). The facts in this case are set forth in the syllabus:

> A testator devised lands and personal property to his executors and successors and their heirs in trust, and directed that the income, until his youngest grandchild who might live to be 21 years of age should arrive at that age, should be divided equally among the testator's children, or the issue of any child dying, and among the grandchildren also as they successively came of age; that "after the decease of all my children, and when as soon as the youngest grandchild shall arrive at the age of

21 years," the lands should be "inherited and equally divided between my grandchildren *per capita*," in fee, and that "in like manner" the personal property should "at the same time be equally divided among my said grandchildren, share and share alike *per capita*."

Mr. Justice Gray delivered the opinion of the court, and said in part:

This case presents three principal questions:

First. Whether the equitable estate in fee, which Duncan McArthur by his will undertook to devise to his grandchildren, children of his five surviving children, was vested or contingent?

Second. Whether the devise of that estate, so far as it is to the present plaintiffs, was void for remoteness?

* * * * *

If all the children and grandchildren should die before any grandchild should come of age the distribution of the income would necessarily cease. In that event, if any of the grandchildren dying under age should leave children, the effect of the holding the remainder to be contingent upon the coming of age of the youngest grandchild would, as that contingency had never happened, cut off the great-grandchildren from any share in the estate, in direct contravention of the general intent of the testator. The more reasonable inference is, that upon the determination of the life estate by the death of all the children and grandchildren, for whose benefit it was created, the great-grandchildren would be immediately entitled to the remainder. (*Castle* v. *Eate*, 7

Beav., 296; *Mansfield* v. *Dugard*, Gilb. Eq., 36; S. C. 1 Eq. Cas. Ab., 195, pl. 4.) Upon that construction the contingency contemplated must necessarily happen at some time, either by the arrival of the youngest grandchild at 21 years of age, or by the death of all the grandchildren under age; and the case would come within the settled rule that "where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event which must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainder-man is *in esse* and ascertained; provided that nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession. (*Doe* v. *Considine*, 6 Wall., 458, 476; *Moore* v. *Lyons*, 25 Wend., 119, 144; *Blanchard* v. *Blanchard*, 1 Allen, 223, 227.)

The terms in which the testator has expressed his intention likewise point to a vesting of the remainder in all his grandchildren.

* * * Words directing land to be conveyed to or divided among remainder-men after the termination of a particular estate are always presumed, unless clearly controlled by other provisions of the will, to relate to the beginning of enjoyment by the remainder-men, and not to the vesting of the title in them. For instance, under a devise of an estate, legal or equitable, to the testator's children for life, and to be divided upon or after their death among his grandchildren in fee, the grandchildren living

at the death of the testator take a vested remainder at once, subject to open and let in afterborn grandchildren; although the number of grandchildren who will take, and consequently the proportional share of each can not, of course, be ascertained until the determination of the particular estate by the death of their parents. (*Doe* v. *Considine*, 6 Wall., 458; *Cropley* v. *Cooper*, 19 Wall., 167; *Dingley* v. *Dingley*, 5 Mass., 535; *Doe* v. *Provoost*, 4 Johns, 51; *Linton* v. *Laycock*, 33 Ohio St., 128; *Doe* v. *Perryn*, 3 T. R., 484; *Randoll* v. *Doe*, 5 Dow, 202.) So a direction that personal property shall be divided at the expiration of an estate for life creates a vested interest. (*Shattuck* v. *Stedman*, 2 Pick., 468; *Hallifax* v. *Wilson*, 16 Ves., 168; *In re Bennett's Trust*, 3 K. & J., 280; *Strother* v. *Dutton*, 1 DeG. & Jon., 675.)

For these reasons we are of opinion that the will purports to devise to all the grandchildren *per capita*, children of the five surviving children of the testator, a vested remainder in fee; and to the children *per stirpes* of any grandchildren deceased before the arrival of the youngest grandchild at 21 years of age, a similar estate in fee by way executory devise (pp. 375, 378, 379, 380, 381).

Thaw v. *Ritchie* (136 U. S., 519). The facts in this case are stated as follows:

A testator devised all his real and personal estate to his widow for life, in trust for the equal benefit of herself and their two children, or the survivors of them; and devised all the property remaining at the death of the widow

to the children or the survivor of them in fee; and if both children should die before the widow, devised all the property to her in fee.

* * * * *

The court said:

There is nothing in the nature of the interest that these children took under the will of their father, which should prevent a sale of it under the statute of 1798, when necessary for their maintenance and education. That statute is not restricted to legal estates or to estates in possession. The effect of the testator's dispositions, though obscured by some confusion and superfluity of language, was to give the legal estate in all his land to his widow for life; the equitable and beneficial estate for her life to her and the two children, or the survivors of them, in equal shares; and the legal estate in remainder, after the death of the widow, to the two children, in fee; with two limitations over in fee, by way of executory devise (neither of which impaired the precedent estates or ever took effect), the one, of the share of a child, dying before the mother, to the surviving child, and the other, of the whole estate to the mother, in case she survive both children. The legal estate in remainder in the children, which nothing but their own death before the determination of the widow's life estate could prevent from vesting in possession, vested in them from the death of the testator, subject to be divested by their dying before the widow. (*Doe* v. *Considine*, 6 Wall., 458, 476; *McArthur* v. *Scott*, 113 U. S., 340, 379.) Their legal

estates in remainder, as well as their equitable estates for life, were present interests, which might be sold for their maintenance and education (pp. 519, 545, 546).

The cases of *Doe* v. *Considine*, *McArthur* v. *Scott*, and *Thaw* v. *Ritchie* are cited in the case of *Land Title and Trust Company* v. *McCoach* (*supra*), and upon their authority the court there held that a remainder limited upon a life estate vested at the death of the testator, and that an inheritance tax was properly collected thereon at the time of the testator's death.

In the case of *Brown* v. *Kinney* (*supra*), the court said:

> Section 24 of the testator's will gives the residue of the estate to trustees who are to "stand seized of my said trust estate to the use of my child or children living at my death, and of the lawfully begotten issue then living of the body of any child of mine who then shall have deceased; but so that the interest or interests of such my child, children, and issue, respectively, shall only become absolutely vested in such of them as shall then have attained, or shall thereafter live to attain, the age of twenty-five (25) years." The testator left surviving him, as his only child, an infant son a few months old, John Nicholas Brown, jr.
>
> * * * * * * * * The question is whether the beneficial interest given by the testator to his infant son became at the testator's death a vested interest, subject to being divested by his death before reaching the age of 25 years, or whether

it became a contingent interest which could only become vested by reaching that age. After a thoughtful examination of the whole matter, I am clearly of the opinion that, from every view point, both authority and reason sustain the former construction.

* * * No contingency attaches to the right of enjoyment; the only contingency is as to the extent of the actual enjoyment. It is the uncertainty of the right of enjoyment which renders a legacy contingent, not the uncertainty of its actual enjoyment. The law does not favor a construction which suspends the title. The only suggestion of contingency in this case is found in the time of payment, not in the right to the estate itself, and, if the language affords ground for doubt, the courts will, if it is reasonable to do so, construe such to have been the intent of the testator.

Other Federal decisions in harmony with those already cited are—

Williams v. *Hedrick*, 96 Fed., 657; *Tirrell* v. *Bacon*, 3 Fed., 62; *In re Wood* (N. Y.), 98 Fed., 972; *In re Haslett*, 116 Fed., 680; *In re McHarry*, 11 Fed., 498.

B. NEW YORK STATE CASES HOLDING THE INTEREST OF ALFRED G. VANDERBILT IN THE PRINCIPAL VESTED AT THE DEATH OF HIS FATHER.

Doe v. *Provoost* (4 John., 61). Testator devised premises as follows:

* * * I devise to my daughter, Christiana Provoost, the dwelling house and ground she now lives on, to hold the said house and ground

> for and during the term of her life; and immediately after her death, I give the same unto and among all and every such child and children as the said Christiana shall have lawfully begotten, at the time of her death, in fee simple, equally to be divided between them, share and share alike.
>
> * * * * *

At her death J., her only surviving child, and father of defendants entered, J. devised the premises to defendants. The mother of plaintiffs, a sister to J., was living at death of testatator, but died before the demise of Christiana. Plaintiffs brought suit for their proportional share and recovered judgment, the court holding the remainder vested at death of testator. The court said:

> * * * On the part of the lessors of the plaintiff, it is insisted, that upon the testator's death, the whole estate vested at the same time, namely, an estate for life in his daughter, and a remainder in fee in her children then living; and, that in case Christiana should have borne any other child or children after the date of the will, that the estate in remainder would open for the purpose of letting in "such child or children" for their share. On the part of the defendants it is admitted that, upon the death of the testator, Christiana took an estate for life; but it is contended that the remainder was contingent and did not vest until her death, and that then it went to her surviving child, under whom the defendents claim.
>
> This latter construction of the will is extremely harsh, and opposed not only to the justice of

the case, but, in my opinion, to the manifest intention of the devisor. The effect of it would be to exclude the grandchildren of Christiana altogether; and it ought, therefore, not to be allowed, unless the words of the devise admit of no other reasonable interpretation. I think the devise does admit of another construction, and one perfectly warranted by the words in which it is expressed.

* * * * *

The result of this construction is that, upon the decease of the devisor, Christiana took an estate for life, and her four children, then living, took a vested remainder in fee; and, in case there had been any after-born child or children of Christiana, the remainder would have been opened for their benefit, so that the property, in the language of the will, might be equally divided between them, share and share alike.

* * * * *

* * * But it is an established rule that the court never construes a limitation into an executory devise when it may take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested. (6 Crui. Dig., 444, s. 11, 3 Term Rep., 488, *Ives* v. *Legg*, in note.)

Hone's Executors v. *Van Schaick* (20 Wend., 564). Testator by a codicil to his will—

gave to each of his grandchildren who should be living at the time of his death the sum of $6,000, to be paid to them respectively upon their attaining the age of 21 or marrying; such payments, however, not to be made without the approbation of the parents of such

grandchildren, to be expressed in writing, the testator desiring that, after the child was of age or married, the parents would fix a discreet and proper time for the payment of the legacies.

In passing upon the question whether or not the statute against perpetuities was violated the court said:

> * * * It is said that these are contingent, not vested legacies; and that the contingency is of such a nature as to work an illegal suspense of the absolute ownership of the property.
>
> * * * * * *
>
> But I think the legatees, severally, took a vested interest immediately on the death of the testator. Where, as in this case, there is a present absolute gift, postponing the time of payment to a future day does not render the legacy contingent. (*Patterson* v. *Elis*, 11 Wendell, 259.) If the testator had stopped after directing the legatees to be paid upon their attaining, respectively, the age of 21 years or marrying, the legacies would clearly have been vested. The clause which follows requiring the approbation of the parents can not alter the case (pp. 567, 568, 569).

Moore v. *Lyons* (25 Wend., 119). Testator in his will provided:

> I give and devise unto the said negro woman Mary my dwelling house and lot of ground, situate, etc. (particularly describing the lot), to have and to hold the same unto her, the said Mary, for and during her natural life; and from and after her death I give and devise the said dwelling house and lot of land to Susan,

> Jane, and Betsey, three daughters of said Mary, or to the survivors or survivor of them, their or her heirs and assigns forever.

All children were living at death of testator. Jane married defendant and had issue Isaac and George, and died prior to Mary's death. Susan also died without issue before her mother. At death of Mary, Betsey, defendant, and his two sons were living. Subsequently Isaac died without issue. Defendant claimed to *hold* a moiety as heir of one son and tenant of the other. The court held a remainder vested in Jane at testator's death and rendered judgment for defendant. The chancellor said:

> A remainder is not to be considered as contingent in any case where it may be construed to be vested consistently with the intention of the testator. The adverbs of time, therefore, such as when, then, after, from and after, etc., in a devise of a remainder limited upon a particular estate, determinable on an event which must necessarily happen, are construed to relate merely to the time of the enjoyment of the estate and not to the time of its vesting in interest. (Boraston's case, 3 Coke's Rep. 19, and Thomas & Fraser's note, X.)
>
> * * * * *
>
> * * * In relation to bequests of personalty, however, Lord Rosslyn, in the case of *Madell* v. *Winter*, (3 Ves. Jun. 543), declared that the postponing of the vesting of a legacy upon the supposition that time was annexed to the legacy itself was a mere positive rule, derived from the practice of the ecclesiastical

courts but not founded upon any just principle of interpretation and that it ought not to be extended. And he says in the same case that the court has not followed that rule in construction of devises of real estate (pp. 143, 144).

Everitt v. *Everitt* (29 N. Y., 39). Testator died leaving five children, the two eldest being plaintiffs and three youngest defendants in this case. The will provided the residue of his estate should be held by his executors in trust for his three youngest children, the income, and, if necessary, the principal, to be used for their support, the principal to be paid upon the arrival of the youngest at the age of twenty-one. Section 8 of the will provided:

> And it is further my will, and I do direct that in case any of my said three younger children shall die before she shall become entitled to be paid in full the amount coming to her for her share, and shall leave lawful issue, her share shall immediately belong to and go to such issue; but if she shall so die without such issue, then her share shall go to the survivors or survivor of my said three younger children (p. 42.)

Plaintiffs sought to have the will declared illegal because of statute of perpetuities. The court held for defendants and said:

> If we consider the case without regard to the trust estate in the executors, and look only to the period when an absolute interest will vest in the children, two questions will arise: First, whether they take the bequest as tenants in common; and secondly, whether the interests

were vested at the death of the testator, or contingent, and not vesting until all the three children arrived at the age of 21 years. If the interests were joint, and if the whole remained contingent and unvested until the majority of the youngest of the three children, the absolute ownership was suspended during three minorities, which would be illegal, and the gift was void at its creation.

* * * * *

Independently of the trust provisions in this will, there is, I think, no ground for saying that these legacies of shares of the residue were not vested at the death of the testator. The leading inquiry upon which the question of vesting turns is whether the gift is immediate, and the time of payment, or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age or surviving some other person, or the like. If futurity is annexed to the substance of the gift, the vesting is suspended; but if it appear to relate to the time of payment only, the legacy vests instanter.

* * * * *

* * * If we test this case by this general principle, it will be apparent that the gift of the residue to the three younger children was a vested gift.

* * * * *

* * * Each of the three children took vested interests in one-third of the residue, in absolute property, subject only to an executory limitation, in the case of the death of one or more

of them under age and without issue, in favor of the survivor or survivors of them.

* * * * *

* * * In technical language the result is that each of the three children took a vested interest, at the death of the testator, in one-third of the residue of his estate, payable on their respectively arriving at the age of 21 years, subject to an executory limitation as to any of them who should die under age and without issue, in favor of the survivors (pp. 72, 75, 76, 77).

Moore v. *Littel* (41 N. Y., 66). The court holding that a grant "to A. for life, and after his decease to his heirs and their assigns forever," creates a vested interest in the children, said:

Future estates are either vested or contingent.

They are "vested when there is a person in being who would have an immediate right to the possessions of the lands upon the ceasing of the intermediate or precedent estate."

They are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain.

* * * * *

If there "is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate, then that remainder is vested" within the terms of the statute. It is not "a person who now has a present fixed right of future possession or enjoyment," but a person who would have an immediate right if the precedent

> estate were now to cease. I read this language according to its ordinary and natural signification, and if you can point to a human being and say as to him, "that man or that woman, by virtue of a grant of a remainder, would have an immediate right to the possession of certain lands if the precedent estate of another therein should now cease," then the statute says he or she has a vested remainder (p. 76).

Manice v. *Manice* (43 N. Y., 303). Testator among other things in his will provided after death of his wife a part of his estate should be held in trust to pay the income to his daughter for life,

> and after her death, or after the time of said distribution, in case she shall have previously died, to divide the said two-twelfth parts into as many shares as there shall be children of my said daughter living at her decease, and to retain one of said shares for each of said children, and to accumulate the net income thereof during his or her minority; and on his or her arrival at the age of 21 years, to pay him or her the same, with its accumulations; provided, however, that in case either of said children shall, during his or her minority, be in need of any portion of said income for his or her support, my said trustees are authorized to apply the same; and provided that in case of the death of either leaving lawful issue, the said share is to be paid to such issue; and in case of his or her death during minority without leaving lawful issue, then such share is to be paid to the survivors of said children; and in case of default of issue of my said daughter,

> then to convey, transfer, and pay over the said two-twelfths to my heirs at law, in such shares and proportions as, by the present laws of the State of New York, they would take and inherit real estate of which I died seized and intestate (pp. 316, 317).

Two other portions were given to other daughters and their issue under like provisions. The court held the remainders to the grandchildren vested at death of testator, saying:

> But a devise of lands to an infant, when he shall become of age, with remainder over, if he die under age, creates a vested, and not a contingent, estate in the infant. It is defeasible by condition subsequent. His coming of age is not a condition precedent to the vesting of his estate. Where nothing is interposed between the infant and his enjoyment of the possession of the estate, except his own minority, he has a vested estate, subject to be defeated by the condition subsequent of his dying under age.
>
> This rule is well settled in regard to real estate, though it is different, in some respects, as to personal property. (*Doe* v. *Moore*, 14 East, 604; Roper on Legacies, 571; *Roome* v. *Phillips*, 24 N. Y., 463; *Paterson* v. *Ellis*, 11 Wend., 259; *Everitt* v. *Everitt*, 29 N. Y., 76, 82, 97; *Phipps* v. *Ackers*, 9 Cl. and Finnelly, 583; *Kane* v. *Gott*, 24 Wend., 641; *Phipps* v. *Williams*, 5 Simons, 44; 2 Redfield on Wills, 592–641; *Gilman* v. *Reddington*, 24 N. Y., 16.)
>
> The infant children of any daughter, who may survive their mother, will, therefore, have

a vested estate in the lands, to take effect in actual enjoyment upon their attaining their majority, and indefeasible in case of their death before attaining 21 (pp. 380, 381).

Mr. Justice Peckham in *Livingston* v. *Greene* (52 N. Y., 118), said:

> The testator, after having given a life estate to his wife in all his real estate, in the seventh clause of his will provides as follows: "From and after the decease and death of my beloved wife, I give and bequeath all my real estate then being * * * to all my children and to their heirs and assigns for ever, to be equally divided, share and share alike; and should any of my children die and leave lawful heirs, such heirs to receive the portion that their parent would have been entitled to had such parent lived; viz: After the death of my beloved wife, I give to my son, John A. Livingston, one equal share," and so on, naming all his eleven children.
>
> In the ninth clause he declares that "on the event happening of the death of my wife, and on a division of my estate in equal shares amongst my children as named in the seventh section of this my will, I hereby declare such shares to be an estate in fee to them and their heirs and assigns; and they or either of them are empowered to give good and sufficient deeds for his, her, or their shares of my real estate."
>
> It can not be denied that the children of the testator, under this will, took a vested remainder in his real estate at his death.

The common law and the statute definition of a vested remainder are both satisfied with this provision. (4 Kent, 202; 1 R. S., 723, § 13.)

It is said that the law favors vested rather than contingent remainders. This was so at common law for a reason that has long ceased to exist in this State.

The reason was that, if contingent, it was in the power of the life-estate man to defeat the remainder by a fine or a feoffment. (*Ives* v. *Legge*, 3 Tr. R., 488, note; 4 Kent, 204, and note.)

But the rule seems still to prevail. (2 Wash. on Real Prop., 510; 4 Kent, 204.)

The words "after" and "upon the death of my wife" and like words do not make a contingency, but merely indicate when the remainder shall take effect in possession—the commencement of the enjoyment of the estate. *Moore* v. *Lyons*, 25 Wend., 119, is an authority covering this whole case. (4 Kent, 203, and note; *Doe* v. *Provoost*, 4 J. R., 61; *Boraston's Case*, 3 Coke, R., 19; 2 Cr. Dig., 295; *Meyer* v. *Eisler*, 29 Md., 31) (pp. 122, 123).

Warner v. *Durant* (76 N. Y., 133). Testator bequeathed property in trust, the interest and earnings to be paid to relatives for five years, and five years from his decease to pay over the principal to said relatives. The court said:

> This case presents the question whether a legacy became vested in the legatee in his lifetime, though he died before the time fixed for the payment.
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> * * * * *

> * * * Here the gift as at first to executors, to hold in trust for five years; and at the expiration of that period, to pay over to the legatee.
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> * * * * *
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> * * * Where the gift is to be severed instanter from the general estate, for the benefit of the legatee; and in the meantime, the interest thereof is to be paid to him; that is indicative of the intent of the testator that the legatee shall, at all events have the principal, and is to wait only for the payment, until the day fixed.
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> * * * * *
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> We are of the opinion that the legacy to Oliver Blush vested; * * *

Monargue v. *Monargue* (80 N. Y., 320). M. bequeathed property to his wife for life, upon her death to his four daughters for life, remainder to their respective children. Held: Remainders vested on death of testator in the children of his daughters then living, subject to open and let in after-born children.

Radley v. *Kuhn* (97 N. Y., 26). One provision of the testator's will read as follows:

> Second. I give, devise, and bequeath unto my executors hereinafter named the houses and premises known as Nos. 472 Eighth avenue and 496 Ninth avenue, in said city, together with all other property, real and personal, not hereinbefore devised, in trust, however, to and for the following purposes, to wit: To take charge of the said real estate, and to collect and receive all income therefrom and to

pay all taxes, assessments, and interest moneys thereon, and out of said income from the house No. 472 Eighth avenue to pay each of my grandchildren, William and Thomas Radley, the sum of $700; said sum to be paid each of them, without interest, at their respective arrival at the age of 21 years; and in case either shall die before such age the survivor to have the whole sum of $1,400, and in case they both should die before that age my executors have no part of said sum to pay to any one whomsoever, and said payments so to be made are to be made, are to be free of their parents' control; the trust hereby created is to continue until my son, Charles Henry, arrives at the age of 25 years, unless the said Charles Henry sooner dies. If he lives to be of such age, he is to have the rents and income and benefit of the said real estate No. 472 Eighth avenue only (after the aforesaid payments therefrom are made) during his lifetime; and if he should die, leaving any lawful children, the said real estate on Eighth avenue is to become theirs, in fee, when they arrive at the age of 21 years, and the same is devised accordingly. And my two daughters, Matilda Kuhn and Margaret Schonenberger, are to have all the income and benefit from the real estate No. 496 Ninth avenue, each to share and share alike (after all interest, moneys, taxes, and assessments thereon are paid when due), during their lifetime, and at their death, if they leave any lawful children, the said real estate on the Ninth avenue only is to become theirs, in fee, and the same is devised accordingly.

> The testator died in 1878, leaving him surviving the three children and the two grandchildren mentioned in the will; his son Charles was then 18 years of age, the oldest grandchild about 14 (pp. 28, 29).

It was contended this infringed upon the statute against perpetuities. The will was sustained. The court said:

> It is well settled that where an estate in land is devised to an infant, "when he attains the age of 21 years," his attaining that age is not a condition precedent to the vesting of his estate, but a simple postponement of the period at which he shall take possession. He takes a vested fee. A contingent remainder over, may, under section 16, be limited on such fees to take effect in case of the first devisee dying before 21. Such contingent remainder overoperates to reduce the absolute fee of the devisee first named to a determinable fee. But the condition on which the remainder over is to take effect is a condition subsequent. It does not prevent the vesting of the fee in the first devisee, but merely renders such fee defeasible by conditions subsequent.
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> * * * * * * * When, therefore, as in the present case, there is no such contingent limitation over, the devisee or devisees to whom the land is given, "when they become of age," take an absolute and indefeasible fee, and, in case of their dying under age, the fee vests in their heirs and not in the heirs of the testator.

This point was well settled in *Boraston's case* (2 Co. R., 19), and has often since been adjudicated. In *Boraston's case* the testator devised land to his executors for a term of years and until his son H. should attain the age of 21 years.

The will then proceeded: "When the said H. shall come to his age of 21 years, then I will he shall enjoy said upper part to him and his heirs forever." No remainder was limited over in the event of H. dying before 21. H. died at the age of 9 years; and it was held that executors took a term of years to continue until such time as H. would have arrived at the age of 21 years had he lived, and H. took a vested remainder in fee, and that on his death the estate descended, subject to the term of years of the executors, to the heir-at-law of H. and not to the heirs of the testator (pp. 35, 36).

Van Brunt v. *Van Brunt* (111 N. Y., 178). Testator's will provided that his property should be held in trust for his children for their lives, and to surviving wife or husband of each for life, and upon the death of the children and their husband or wife to testator's grandchildren *per stirpes*, to receive the income during minority when the whole interest should be given to them.

In holding this provision not contrary to the statute against perpetuities, the court said:

> But assuming the trust estates which precede the remainders to be valid, it is contended that such remainders to the grandchildren further suspend the power of alienation beyond a single

minority. That contention proceeds upon the theory that the remainder does not vest until all the grandchildren in one of the trusts, who take their father's share, become of full age, and is founded upon the fact that they are to take *per stirpes*, and that they are to receive the income until of full age, "when their interest shall be given to them."

* * * * * * * * This language assumes in the grandchildren an existing "interest," the possession of which is postponed during minority, and the remainder in fee in each case vests in interest upon the termination of the precedent estates, the possession only being postponed; so that if, upon the death of testatrix, each minor grandchild then living took only a contingent future estate, yet, upon the death of its father and mother, the contingency disappeared and the estate vested at that date as a remainder in fee. (*Manice* v. *Manice*, 43 N. Y., 374.) It was distinctly held in that case that where nothing is interposed between the minor and his enjoyment of his estate except his own minority, the estate is vested. And the case becomes stronger when, during such minority, the accruing rents and profits are given to the minor. In such event the gift of the intermediate income indicates an intention to vest the *corpus* from which the income is to be derived. (*Robert* v. *Corning*, 89 N. Y., 225, 241.)

Goebel v. *Wolf* (113 N. Y., 405). Testator left property in trust for his wife during her life, then and "immediately upon the arrival of my youngest child at the

age of 21 years," the property to be divided among the children. One of the four children living at death of testator died under age. Court held the children took a vested remainder upon death of testator and that heirs of child who died were entitled to his share.

Campbell v. *Stokes* (142 N. Y., 23). It was held that a remainder limited upon life estate vests on death of testator and remainder-men must be joined in action for partition.

> It is plain that upon settled rules of construction the issue of any child of the testator living at his death took under the will a vested remainder in the share held in trust for the parent for life, subject to open and let in after-born children, and to be defeated by their death before the death of the parent. The limitation in its general aspect is very familiar and one frequently found in wills. Upon the death of the testator, individuals of the class entitled to take in remainder were in existence and ascertainable. The only contingency which would defeat their remainders vesting in possession was their death before the death of the parent. It was a subsequent and not a precedent condition.
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> * * * * * * * * Those entitled under this will as remainder-men took, not because the power of division was given to the trustees, but independently thereof, as primary devisees in remainder under the will. The class may be enlarged or diminished, or the rights of the issue of any child may be extinguished by the extinc-

tion of such issue by death before the termination of the life estate, but this does not affect the question. The issue living are presumptively entitled in remainder, and during the life of the parent, they, living, have a vested future estate in the parent's share (pp. 29, 30).

In *Matter of Seaman* (*supra*), the court said:

I think the four children of George took vested interests in the residuary property, both real and personal, at the death of the testator, subject, on the one hand, to open and let in after-born children, and, on the other, to be defeated by death without issue during the running of the life estates. (*Campbell* v. *Stokes*, 142 N. Y., 23.) The case cited related to real estate, but except as to a suspension of absolute ownership, limitations of future or contingent interests in personal property are subject to the same rules as those which relate to future estates in land. (1 R. S., 773, §2.) The respondent, nevertheless, relies upon the rule applying to bequests of personalty that, where time is of the essence of the gift, and there is no present gift, nothing passes until the prescribed period arrives. (*Warner* v. *Durant*, 76 N. Y., 133; *Smith* v. *Edwards*, 88 id., 92.) A reference to those cases and others which have followed them shows that the rule formulated was for the construction of bequests where there was no gift at all, except that involved in the direction to divide at a future time. Here there are words of present gift, for the phrase "upon her decease," like the expression "from and after," does not prevent the legacy from vesting. (*Nelson* v. *Russell*,

135 N. Y., 137.) Explicitly the will says, "I give, devise, and bequeath" the estates in remainder, and we are not compelled to resort to a direction to divide for an inference of an intention to give at all. I think the rule referred to has no application to a case like the present, where there are explicit words of gift beyond a direction to divide.

Upon that view of the will, it is obvious that a right of succession to the estates in remainder passed at once on the death of the testator to the four children and was a vested interest, although subject to be defeated or modified by subsequent contingencies (p. 74).

In *Matter of Davis* (*supra*), the court said:

* * * He (appellant), however, admits that the estate or interest devised to the respondent was liable to be defeated by her death previous to that of her mother, and, therefore, that it was not certain until her death that the respondent would enjoy any part of the estate of the testatrix, although she had a vested interest in it. The facts thus admitted bring this case within the principle of the *Matter of Seaman.*

C. CASES CITED BY PLAINTIFF IN HIS BRIEF TO SUSTAIN HIS CONTENTION THAT THE REMAINDERS ARE CONTINGENT.

Smith v. *Edwards* (88 N. Y., 92). Testator's will provided:

Sixteenth. I have $30,000 invested in United States registered bonds, which I order and direct to have kept invested until my youngest grandchild now born, or that may hereafter be born before final distribution of my estate, shall

be of full and lawful age; and that my executors, out of the interest and net increase thereof keep up and in good order and condition all stones, railings, etc., in and about the Edwards lot in the Fayetteville Cemetery, replacing any stone that may be broken, and repairing said railing, etc., as from time to time may become necessary; and that they make up out of said increase and interest any deficiency there may be in funds to pay legacies and meet the other provisions of this will * * * (p. 93).

And that the executors may if they see fit divide $10,000 of the principal and any of the interest among my children and grandchildren.

* * * and if either shall die before payment, leaving issue, then his or her aforesaid legacies, and portion to his or her children; but if either shall die without issue and before payment, then his or her legacy and portion to the surviving brothers and sisters.

And when my youngest grandchild born, and that may within twenty years be born, shall arrive at full age, or if a granddaughter shall sooner be lawfully married, my executors shall divide the remaining $20,000 (now in such bonds), and such increase as they may then have, into two equal parts, and shall divide one moiety, or half thereof, equally between my four children, Thomas C., Marion E., Elizabeth E., and Howard H., or into five parts, so as to include my daughter Julia P., should she become rational; and shall divide the other moiety or half equally between all of my grandchildren who may then be living—including such as may

be hereafter born; and if any child or grandchild shall die before such division and distribution, then his or her share to his or her children; but if without issue, then to his or her brothers or sisters; but in all cases the share and portion of any one under age shall be kept invested and on interest until he or she shall arrive at full age, or be, as aforesaid, lawfully married.

The testator left him surviving the five children and four grandchildren named in the sixteenth clause. The grandchildren were all minors at the time of his death, and one of them was a minor at the time of trial. The testator's daughter Julia died insane. After the death of the testator one grandchild was born, who has since died.

* * * * *

The only material question is whether the will created future estates in the children and grandchildren, not measured by lives in being, or whether as to the whole or any part of the special fund here bequeathed it vested at the death of the testator, the time of payment only being postponed (pp. 94, 95, 103).

The court held the part of the bequest directed to be paid at the date of final distribution to his grandchildren who should be living at that date to violate the law against perpetuity, as—

* * * The ultimate vesting of this portion of the principal of the special fund was plainly postponed for twenty years, and not during designated lives in being, and must be declared invalid.

> Its failure does not necessarily draw with it the portion of the bequest given to the four children and four grandchildren named and who were *in esse* at the date of testator's death. It does destroy so much of it as consisted of the accruing interest upon the portion which failed. * * *
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> * * * * *
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> These legacies depend upon no condition or contingency. The legatees are to take, or their issue or survivors, as holders of substituted estates, in any event, and no uncertainty of ultimate vesting attaches to the substance of the gift (pp. 104, 105).

In holding these last-mentioned provisions in section 16 in violation of law, the court recognized that—

> * * * the general rule is declared to have an exception grafted upon it, that where the gift is to be severed *instanter* from the general estate for the benefit of the legatee, and in the meantime the interest is to be paid to him, that is indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for the payment until the day fixed (p. 105).

But the court analyzed the terms of the will to discover the intent of the testator, saying:

> * * * It is a very plain inference from this assigned reason of the exception that it can only apply where the whole interest is given during the delay of payment. If any part of it is diverted to purposes other than the benefit of the legatees, that is treating the principal as not belonging to them, but remaining in the estate

as a source of income for the benefit of the estate; and so the authorities decide. (*Leake* v. *Robinson, supra; Hanson* v. *Graham*, 6 Ves., 239; *Watson* v. *Hayes*, 5 Myl. & Cr., 125; *Warner* v. *Durant, supra.*) In the present case the whole interest is not given. Some part of it, and that first accruing, is diverted to the purposes of the estate, and what is given is only through a permitted discretion of the executors prior to the period of final distribution. The disposition of the interest thus made can not safely be said to import and intention to vest the gift of the principal at the date of the testator's death (pp. 106, 107).

We have thus explored the will in vain for any safe and adequate ground which would take the bequests to the named legatees out of the operation of the general rule. The difficulty is that there is no present gift to them, and no language or provision from which such immediate gift can be properly inferred. The bequest to them lies wholly in the direction for future division and distribution, and can be fairly derived from that clause alone. In the whole of the clause under consideration the postponement of the legacies for a period which may reach forty years appears plainly to be intended, and is always kept in view. We can not read the words "that may hereafter be born" and "that may within twenty years be born" as referring only to the birth of grandchildren between the making of the will and the death of the testator. They plainly refer to a period after his death, and the will speaks from that date (pp. 108, 109).

Greenland v. *Waddell*, 116 N. Y., 234. The testator provided in her will that one-third of the residue of the estate should be held in trust, the income to be paid her sister for life, and upon her death to pay the interest for the maintenance of the sister's children until the youngest reached the age of 21; then the principal to be paid the children, but in case there should be no issue, to be paid V. B. and S. V.

The question was whether or not this provision violated the law providing that "the absolute ownership of personal property shall not be suspended * * * for a longer period than * * * two lives in being at the death of the testator.

The court said:

> * * * At the time of the death of the testatrix Mrs. Bush had no children living, and she never has had any. But assuming that she does not survive her husband and that on her death she leaves children surviving her under the age of 21 years, the inquiry arises whether the limitation over to them is valid, and that depends upon the determination of the further question whether the absolute ownership would then vest in such children. If it would there would be no unlawful suspension. Otherwise it is difficult to see how the provision made for them by the will can be supported. The will does not, in terms, give the fund to the children but directs the executors, in the events mentioned, to pay it to them. The postponement of the time of payment of a gift is not important; that alone will not qualify the abso-

lute character of the ownership. The vesting of it is suspended if some period in the future is annexed to the substance of the gift. In the present case the conditions upon which the right of the children to take the fund depend are to or may arise in the future, beyond the time of the death of the mother, and the contingency is uncertain. The children must reach the age of 21 years, and if they do not, the fact that the direction is that the fund go to Mr. Boerum and Mrs. Vanderveer, is not consistent with the vesting of the absolute ownership in the children on the death of their mother. It is therefore clear that in the case supposed, and which may arise if Mrs. Bush should leave children her surviving, the observance of the direction of the will will operate to suspend the absolute ownership of the fund for some period of time after her death.

Vawdry v. *Geddes* (1 Russ & Mylne, 203). Testator provided residue of his estate should be invested and the income divided among her four sisters during their lives, and on their death that the interest on their respective shares be applied for the benefit of the issue of each sister so dying, until they are 22 years old, when they shall be entitled to their proportion of their mother's share of the principal

> * * * and in case of any of their decease under that age, leaving lawful issue, such issue shall be entitled to their respective parent's share at such time as such parent would have been entitled, if living, thereto, with the benefit of the interest or produce thereof in the meantime; but in case any such children shall die

> under the said age without leaving issue, or such issue shall die before they are entitled to the principal of their shares, that then the other children of my said sisters shall be entitled thereto, together with the issue of any of them who shall be then dead, in like manner, and with the like benefits of survivorship as their original shares; but in case all the children of any of my said sisters shall die without issue, or, there being such issue, they shall die before the principal of their respective shares shall become payable, then the share of such of my sisters, whose children shall so die, shall be paid and applied to and for the benefit of my other sisters, and their respective children or issue, in like manner as their original shares * * * (pp. 203, 204).

The court held that the case was analogous to *Leake* v. *Robinson* (2 Mer. 363):

> * * * In that case Sir William Grant proceeds upon this principle—that the prescribed time can not be considered as marking only a time of postponed payment, because there is no antecedent gift—no gift but in the direction to pay at the particular period.

And added:

> * * * Where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property; but that presumption fails entirely, when the testator has expressly declared, that the legacy is to go over,

> in case of the death of the legatee before a particular period. I speak here of gifts of personal estate, and not of real estate.
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> * * * * *
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> My opinion, therefore, is, that the gifts over to the children of the sisters, whether born before or after the death of the testatrix, not being to take effect until the age of 22, are too remote and void (pp. 207, 208).

Referring to this case the court in *Smith* v. *Edwards* (*supra*) said:

> * * * It was held that although the bequest of interim interest raises a presumption of an immediate gift intended, yet that presumption fails entirely when the testator has expressly given the legacy over, in the event of the death of the legatee before a particular period. That would seem to be the correct conclusion. If the testator in such case intended and understood an immediate gift vesting at his death, the legacy would go by operation of law upon the decease of such legatee to issue and survivors as next of kin. A clause of substitution, aiming at precisely that result, would be unnecessary and superfluous; and only important where the vesting was intended to be postponed, and for that reason a lapse of the legacies given was to be prevented (p. 107).

D. SUMMARY OF CASES UPON VESTED REMAINDERS.

Smith v. *Edwards* is distinguished from the case under consideration in three particulars: The court points out in that case that (1) the whole interest is not given, but a portion is assigned to purposes of the

estate; (2) the executors are empowered to distribute only such portion as they wish before final settlement, and (3) there is no language indicating a present gift. In all of which points the seventeenth section of the Vanderbilt will differs.

In *Greenland* v. *Waddell* the issue is not whether the interest vested, but whether "absolute ownership," which includes the power of disposition by will or otherwise, was given by the terms of the will. The court held that to deny this power of disposition and direct the fund shall be paid to B. and V. in case of death of the first legatee is not passing "absolute ownership." *Vawdry* v. *Geddes* has been strongly relied upon by plaintiff. Without inquiring whether or not the reasoning that "although the bequest of interim interest raises a presumption of an immediate gift intended, yet that presumption fails entirely when the testator has expressly given the legacy over, in the event of the legatee dying before a particular period," because the substitution clause is "unnecessary and superfluous," is applicable to the facts in those cases, it clearly is not applicable to the case being considered. If the testator had provided for nothing but the payment of interest and at a later date the principal to Alfred G. Vanderbilt, discontinuing the seventeenth section after the words "responsibility in respect thereof," the disposition of the property upon death of Alfred G. before reaching the age of 35, would be entirely different from that set fourth in the remainder of the section. The testator does not desire the principal

be paid Alfred G.'s issue until they reach their majority; he does not desire the property to be equally divided among the collateral heirs of Alfred G. if he dies without issue, nor does he desire Reginald C. to take the property under any conditions other than those provided for Alfred G. To effect his desires the testator was compelled to insert the provisions in his will, and it is impossible to regard them as "unnecessary and superfluous."

However, even if these three cases considered alone are regarded as authority for holding the remainders of Alfred G. contingent, they must be disregarded as authorities when considered with the numerous cases decided by the New York court of appeals cited above, which form an unbroken chain from earliest decisions to the present time. These are overwhelming authority for holding such remainder as this to vest at the death of the testator. The cases of *Hone's Executors* v. *Van Schaick*, *Everitt* v. *Everitt*, *Manice* v. *Manice*, *Warner* v. *Durant*, *Radley* v. *Kulin*, *Van Brunt* v. *Van Brunt*, *Goebel* v. *Wolf*, *Matter of Vanderbilt* are directly in point.

There as here we find a bequest to trustees to pay the income to the legatee for a period and then to pay the principal. In most of those cases as here we find a limitation over in case the first legatee dies before arriving at the required age; and in this case we find words indicating the intention of the testator that the property shall pass to and vest in the legatee immediately. He says, "I give, devise, and bequeath to my

executors in trust;" and regarding Reginald C.'s interest, he says, "I give and devise the same accordingly;" and toward the close of section 17, after making several provisions for disposition of the property in case of death of legatees, he finally says, "I give whatever then remains * * * to my daughters." This indicates beyond equivocation a present gift to all legatees.

We find that the court of appeals has passed upon this very question after consideration, for authorities are cited with the following statement of the court (172 N. Y., 72):

> * * * The only contingency, therefore, that can happen to defeat his taking the estate in possession is his death before the period fixed for the transfer of the property to him. The estate created, therefore, is an estate in trust for the periods mentioned, with a remainder vested in Alfred G., subject to be defeated by his death before arriving at the age of 30 or 35. (*Matter of Seaman*, 147 N. Y., 72; *Campbell* v. *Stokes*, 142 N. Y., 23; *Manice* v. *Manice*, 43 N. Y., 370; *Warner* v. *Durant*, 176 N. Y., 133; 2 Washburn on Real Property, 629.)

The other New York cases cited in this brief are analogous to this case arising from the Vanderbilt will and indicate the established law of that State.

Among the decisions of the United States courts *Prive* v. *Wilkins*, *Cropley* v. *Cooper*, *McArthur* v. *Scott*, and *Brown* v. *Kinney* are in every particular in point and the analogous cases cited establish the correctness of the conclusions beyond question.

Thorough investigation thus shows overwhelming authorities to the effect that the interests of Alfred G. vested at the death of his father.

IV. THE INTERESTS WERE TAXED ACCORDING TO THEIR CLEAR VALUE.

The only remaining question relates to ascertaining the clear value of the interests of Alfred G. Vanderbilt. That a vested remainder has at least some "clear" or "actual" value is unquestionable; otherwise it could not be made the subject of sale. Such sales are frequently made and sustained by the courts. The tax is based on the assumption that Alfred G. Vanderbilt will live to be 35 years of age, when the entire legacy will have been paid him. This assumption in turn is based upon standard mortuary tables. They show the average expectancy of life of men at 23 years of age to be 33.23 years. In other words a man 23 years old has an average chance as demonstrated by the mortuary tables of living to be 56.23 years of age. Nothing appears in this case tending to show the legatee is not in sound health, or that he is not subject to this average expectancy. Millions of dollars have been collected by the United States as inheritance taxes under the present law and the law of 1864, based upon these tables. State legislatures have adopted their use and the courts have never questioned their applicability as a test. It is too late now to call into question the custom of the Internal-Revenue Bureau in collecting taxes upon future interests by calculating the expectancy of life of the legatee from these

tables. By paying the tax on the income until he should be 30 the legatee admits the legality of the tax on one-half the principal which will be paid him upon his arriving at that age. One-half the period required before payment of the remainder of the principal has already elapsed and the legatee is now living. If vested remainders are to be taxed at all, mortuary tables must be used to ascertain the clear value of such interests.

The Internal-Revenue Commissioner has assessed the tax in this case upon the assumption that the interests of Alfred G. Vanderbilt are equivalent to a legacy made payable absolutely to him at the death of his father. The only difference in effect is that the time of payment of the principal is postponed a few years. In the meantime the legatee is to have all of the interest of the fund. Nothing could be plainer than that the clear value of his interests were therefore equivalent to a legacy of like amount payable presently. This is a mathematical certainty.

It is respectfully submitted that the collection of this tax should stand.

CHARLES H. ROBB,
Asssistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

WILLIAM K. VANDERBILT ET AL., AS EXECUTORS, etc., plaintiffs in error,
v.
FERDINAND EIDMAN, AS UNITED STATES COLLECTOR of internal revenue, defendant in error.

No. 206.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL STATEMENT FOR THE UNITED STATES.

As bearing upon the questions presented in this case, it is desired to call the attention of the court to the construction placed upon the law of 1862 (reenacted in 1864) by the Internal Revenue Bureau and the "Instructions concerning the assessment of taxes on legacies, distributive shares, and gifts and assignments (to take effect post-mortem) of personal property," issued in 1863 by the Internal Revenue Bureau under the authority of the Treasury Department, at page 203 of "A Manual of the Direct and Excise Tax System of the United States, including the forms and regulations established by the Commissioner of Internal Revenue, the decisions and rulings of the commissioner,

by George S. Boutwell, Commissioner." Collectors of internal revenue were instructed:

> Par. 16. Where legacies are made payable at the expiration of a life or lives in being, the value of the legacy will be estimated by Carlisle's or other approved tables of life annuities.
>
> Par. 17. When a legacy is made payable on a future contingency, the value of the legacy is to be estimated by a consideration of the time, certain or ascertainable by annuity tables, before the legacy will become vested; and the value of the legacy is to be calculated without reference to the fact of its being contingent in favor of any particular legatee.
>
> Par. 20. Where a legacy or sum of money, given or granted as aforesaid, is payable at a remote period, with interest in the meantime, to the legatee, it is to be considered as payable presently, for all the purposes of tax or duty.
>
> Par. 21. Where a legacy or sum of money, given or granted as aforesaid, is payable without interest, at a future and uncertain period, as at marriage, or at the discretion of the executor or trustee, or when the habits of the beneficiary shall have become reformed, the earliest period at which the legatee may become entitled to the legacy or sum of money ought to be assumed as the day at which it is payable, and its value estimated, and tax or duty assessed accordingly.

Respectfully submitted.

CHAS. H. ROBB,
Assistant Attorney-General.

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